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IN THE

Supreme Court of the United States

WESTERN COAL TRAFFIC LEAGUE, *Petitioner,*

v.

SURFACE TRANSPORTATION BOARD
and UNITED STATES OF AMERICA, ET AL., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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July 19, 1999

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QUESTION PRESENTED FOR REVIEW

Whether the Court of Appeals erred through its failure to review interpretations and applications of Court precedent which the Surface Transportation Board used to create a new exception to the common carrier obligations of railroads, which new exception, in the court's words, permits railroads to **exploit** captive consumers.

PARTIES TO THE UNDERLYING PROCEEDING

The parties to the underlying proceeding included the Western Coal Traffic League ("Western Coal") and the following other entities with similar interests: Central Power & Light Company, MidAmerican Energy Company, Pennsylvania Power & Light Company, and the National Industrial Transportation League. In addition, the following parties to the underlying proceeding had interests that were adverse to those of Western Coal: The Surface Transportation Board, the United States of America, the Association of American Railroads, Union Pacific Corporation, Southern Pacific Transportation Company, Norfolk Southern Railway Company, CSX Transportation, Inc., and Consolidated Rail Corporation.

Petitioner, Western Coal, is an unincorporated trade association of consumers of coal mined in the western United States. Western Coal has no parent, subsidiary or affiliate corporations, and does not issue shares of stock to the public. Its members are as follows:

Arizona Electric Power Cooperative, Inc.
Central and South West Services, Inc.
City Public Service Board of San Antonio
Cleco Corporation
Colorado Springs Utilities
Fayette Power Project, Austin, Texas
Kansas City Power & Light Company
MidAmerican Energy Company
Minnesota Power, Inc.
Nebraska Public Power District
Omaha Public Power District

Reliant Energy, Incorporated
Western Resources, Inc.
Wisconsin Public Service Corporation

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Western Coal petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS OF THE COURT OF APPEALS AND THE SURFACE TRANSPORTATION BOARD

The February 10, 1999 opinion of the Court of Appeals is reported as *MidAmerican Energy Co. v. Surface Transportation Board*, 169 F.3d 1099 (8th. Cir. 1999), and

appears as Appendix A to this Petition.[1] A timely petition for rehearing and rehearing en banc was denied by the Court of Appeals in an order dated April 20, 1999, not officially reported, which is attached hereto as Appendix D. The December 31, 1996 and April 30, 1997 decisions of the Surface Transportation Board jointly issued in its Docket No. 41242, *Central Power & Light Co. v. Southern Pac. Transp. Co.*, Docket No. 41295, *Pennsylvania Power & Light Co. v. Consolidated Rail Corp.*, and Docket No. 41626, *MidAmerican Energy Co. v. Union Pac. R.R.*, which were affirmed in part by the Court of Appeals appear, respectively, in Appendices B and C.[2]

JURISDICTION

The Court of Appeals entered judgment in this case on February 10, 1999. This is the same date on which the Court issued its opinion. *See* Pet. App. A-6. The Court entered its order denying rehearing (Appendix D) on April 20, 1999. This Petition for Certiorari is thus timely filed under 28 U.S.C. § 2350. Western Coal invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803, enacted December 29, 1995 ("the Termination Act"), abolished the Interstate Commerce Commission and transferred certain functions and proceedings to the Surface Transportation Board. Section 204(b)(1) of the

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[1] The appendices are separately bound in a companion volume and are cited as "Pet. App. __."

[2] Central Power and Light and MidAmerican are members of Western Coal. Pennsylvania Power and Light settled its dispute prior to the proceedings before the Eighth Circuit.

Termination Act provides that proceedings pending before the ICC on the effective date of the Termination Act shall be decided under law as in effect prior to that date (*i.e.*, the Interstate Commerce Act or "the Act") insofar as the proceedings involved functions retained by the Board after the Termination Act. Both the Interstate Commerce Act and the Interstate Commerce Commission Termination Act are set forth at Subtitle IV of Title 49 of the United States Code.

Among the regulatory functions retained in the Termination Act is the power to set maximum reasonable rates. *Id.* at § 102(a), 109 Stat. at 810-811 (amending *Former* 49 U.S.C. § 10704(a)(1)). Section 204(b)(1) further provides with regard to proceedings pending on the effective date of the Termination Act that "appeals shall be taken therefrom . . . as if this Act had not been enacted." Because the proceedings at issue here were pending with the ICC when the Termination Act became effective, the earlier law is applicable to this case. Citations herein to relevant portions of Title 49 therefore will be to the statute in effect as of December 29, 1995.

The most relevant portions of the Act involved in this case include *Former* 49 U.S.C. § 11101(a), *Former* 49 U.S.C. § 10701a, and *Former* 49 U.S.C. § 10704(a)(1). These statutes are set forth in Appendix E.[3]

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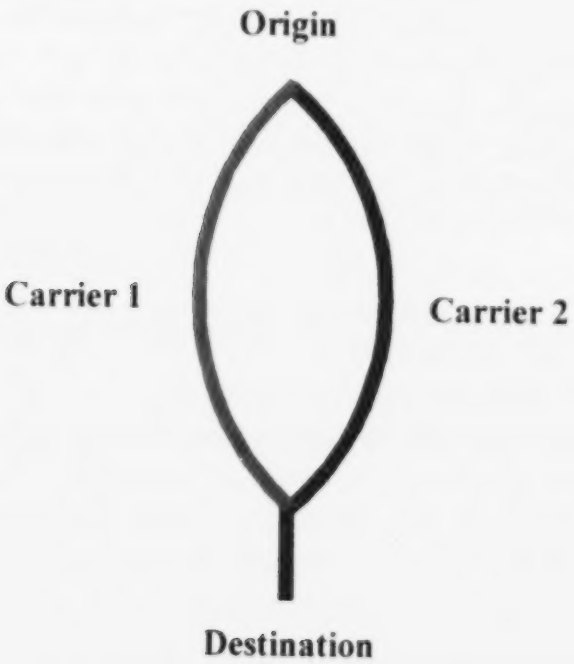
[3] These same provisions of the Act have been carried forward into to new version of Title 49 by virtue of the Termination Act. *See New* 49 U.S.C. § 11101(a); *New* 49 U.S.C. § 10701(c), (d); and *New* 49 U.S.C. § 10704(a)(1).

STATEMENT OF THE CASE

1. Emergence of Railroad Bottlenecks

This case involves the common rail transportation circumstances of three separate electric companies ("utilities") located in Texas, Iowa and Pennsylvania. Each utility could originate the transportation of its substantial coal purchases by two or more railroads, but each could deliver the coal to its generating facility by only one railroad. In railroad parlance, this circumstance (multiple origin carriers, but only a single destination carrier) has become known as a "bottleneck" situation. The following graphic depicts a typical rail bottleneck of the sort in issue in the cases below:



An extensive discussion of how railroad coal transportation bottlenecks operate appears in *Western Resources, Inc. v.*

Surface Transportation Board, 109 F.3d 782, 786 (D.C. Cir. 1997) ("*Western Resources*").

For most of their history, the nation's railroads engaged exclusively in the rendition of common carrier transportation services. All common carrier freight rates were set forth in public tariffs which were comprehensively regulated by the Interstate Commerce Commission. Bottleneck trackage existed in the common carriage era but it was not a problem because the pervasive federal regulation of railroad rates tended to equalize all rail rates for a given commodity.

Beginning in 1976, Congress began to change the railroad landscape through deregulation. To foster competition between railroads, Congress, for the first time, authorized the use of contract rates which were exempted from regulation. By the early 1990s, unregulated rail contract carriage had largely supplanted common carriage. While the common carrier system remained in tact, it was not well patronized. One of the principal features of the common carriage system is the legal requirement that rates be reasonable.[4] Where a railroad enjoys a monopoly, defined in the law as "market dominance," the Surface Transportation Board ("Surface Board") continues to possess the authority to find a particular railroad rate unreasonable and to prescribe a lower and more reasonable one in its place. *See Western Coal Traffic League v. United States*, 694 F.2d 378 (5th Cir. 1982), *on reh'g*, 719 F.2d 772 (5th Cir. 1983), *cert. denied*, 466 U.S. 953 (1984).

Because their generating stations were each located at a bottleneck destination, the utilities were unable to access the

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[4] *Former* 49 U.S.C. § 10701(a).

new reduced rail rates which had emerged at the origins following deregulation. This was so as a consequence of the "one-lump theory" which enables "a monopolist at the end stage of production ... to capture the entire profit". *Western Resources*, 109 F.3d at 787. To lessen their exploitation by the bottleneck railroads, the utilities sought to invoke the Surface Board's regulatory oversight by persuading it to establish reasonable rates over the bottlenecks.[5] These reasonable common carrier rates could then be used by the utilities in combination with competitive contract rates from the origin mines to the points of the bottlenecks to deliver their coal purchases; thereby lowering the overall costs of each utility's coal transportation expense.

2. The Surface Board's Disposition of The Bottleneck Cases

The emergence, after 1980, of a new, competitive, non-homogeneous railroad rate structure restored the currency of the Court's cases which set forth the rules for challenging railroad rates, especially segments of rates. In separate proceedings before the Surface Board, the utilities asked for the prescription of maximum reasonable rates over the bottleneck line segments serving their generating facilities. The bottleneck railroads resisted the electric companies and contended that the law, as illuminated by the Court, did not permit the utilities to challenge their local, bottleneck rates. Rather, contended the railroads, the only challenges permitted by law were challenges of their rates for the entire movements from origins to destinations. Because the statutes are inexplicit in this respect, the railroads based their position before the Surface Board primarily on the decisions in *Baltimore &*

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[5] For example, on one bottleneck in Texas, the railroad rate for coal movements was thirty (30) times greater than a reasonable rate. *See* Pet. App. A-9 n.4.

O. S.W. R.R. v. Settle, 260 U.S. 166 (1922) ("*Settle*"); *Louisville & N. R.R. v. Sloss-Sheffield & Iron Co.*, 269 U.S. 217 (1925) ("*Sloss-Sheffield*"); *Great Northern Co. Ry. v. Sullivan*, 294 U.S. 458 (1935) ("*Great Northern*"); and *Thompson v. United States*, 343 U.S. 549 (1952) ("*Thompson*").

In August of 1996, after the bottleneck cases had been pending before it for two years, the Surface Board took the extraordinary step of consolidating the separate adjudicatory proceedings to allow public input on an issue the Surface Board described as having paramount "industry-wide significance for rail carriers and shippers" -- its power to prescribe bottleneck rates. Pet. App. B-7. In response to the Surface Board's invitation, numerous new parties participated in the proceedings and the Surface Board received voluminous written comments, testimony, and oral argument.

On December 31, 1996, the Surface Board issued a decision in which it dismissed the utility cases. In this decision, the Surface Board endorsed the basic legal position advanced by the railroads In supporting the railroads' thesis that their bottleneck rates could not be challenged where the railroads also offered rates for the entire service from origin to destination, the Surface Board found support in the same Court rulings advanced by the railroads while rejecting the clear support for the positions of the utilities set forth in *Atchison, T. & S.F. Ry. v. United States*, 279 U.S. 768 (1929) ("*Santa Fe*").

In its decision to dismiss the cases of the utilities, the Surface Board was careful to underscore the fact that its decision only reflected the requirements of the law and did not take into account the various policy and economic grounds which had been advanced by the parties. Pet. App. B-21

n.21. The Board made this disclaimer again following court review.[6]

The Surface Board's decision, as subsequently clarified, strips away the ability of captive shippers to benefit from newly emerged competition over non-bottleneck rail line segments by foreclosing the attempts of the utilities to limit the bottleneck carriers' monopoly pricing powers to the bottleneck line segments.

3. The Decision of the United States Court of Appeals for the Eighth Circuit

Upon review,[7] the Court of Appeals affirmed the Surface Board's decision to dismiss the utilities' complaints. Significantly, however, the Court of Appeals upheld the Board's decision on the basis of a policy rationale that the agency had expressly disavowed while it failed completely to review the seriously flawed legal analysis of Court precedent relied upon by the agency as the basis for its decision. Despite the fact that the parties before the lower court exhaustively developed their conflicting interpretations of

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[6] *See* Surface Board Press Release, "Surface Transportation Board Announces Favorable Appeals Court Ruling Affirming 'Bottleneck' Decisions," at 2 (issued February 11, 1999) ("[T]he Board's decisions were premised entirely on these legal grounds . . .").

[7] The panel initially assigned to hear this case consisted of Circuit Judges Henley and Hansen, and District Judge Stevens. Shortly before the oral argument, Judge Henley died and Judge Wollman replaced Judge Henley on the panel. Judges Hansen, Wollman and Stevens heard the argument on November 18, 1997. Following the argument, but prior to the issuance of the panel's decision on February 10, 1999, Judge Stevens died. The panel opinion, by Judge Wollman, states at the outset that "[t]his opinion is consistent with the views [Judge Stevens] expressed at our post-argument conference." Pet. App. at A-7 n.1.

Court decisions on brief and in a ninety minute oral argument, the court ignored these issues in its decision.

In resolving the dispute before it, the court below, in the words of one prominent legal commentator, "misunderstood the grounds for the Board's decision."[8] Instead of grappling with the conflicting constructions and applications of the Court's authorities which lie at the heart of this case, the lower court opted to affirm the dismissal of the utility complaints on the very policy and economic grounds disclaimed by the agency. While the court correctly acknowledged a dearth of direct statutory guidance, it erroneously proceeded to affirm on the grounds of policy and agency expertise while ignoring completely the Surface Board's flawed application of Court precedent:

> Nothing in the Act explicitly requires carriers to provide separate local rates for bottleneck service. Furthermore, requiring carriers to provide separately challengeable rates on bottlenecks would prevent them from **exploiting bottlenecks** and charging rates up to SAC [stand-alone cost] for complete origin-to-destination service. In the Board's view, this would impede the industry's efforts to achieve revenue adequacy, which is necessary for long-term capital investment and, ultimately, for a safe and efficient rail system. The Board therefore properly reconciled the competing policies of the Act when it deferred to carrier discretion in setting routes and rates and held

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[8] Richard A. Allen, *Court Decisions*, 66 J. Transp. L., Logistics and Policy 355 (1999) ("*Court Decisions*").

> that carriers are not required to provide separately challengeable bottleneck rates.

Pet. App. A-23 (emphasis added). The decision described and affirmed by the court is not the same decision authored by the Surface Board. The Surface Board, in its decision, and in its defense of its decision before the Court of Appeals, emphasized that its dismissal of the utilities' cases was rooted in the requirements of the law as defined and propounded by the Court -- not policy and economics.

The Court has emphasized that an appellate court must review a decision and affirm or reverse that decision based upon the grounds articulated by the agency. "It is well established that an agency's action must be upheld, if at all, on the basis articulated by the agency itself." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 50 (1983). Moreover, it is a cardinal rule of administrative law that a reviewing court may not affirm an agency decision on the basis of a rationale the agency itself did not adopt. *See SEC v. Chenery Corp.*, 318 U.S. 80, 87 (1943). Had the court below engaged in a careful review of the Surface Board's application of the Court's precedents, it could not have affirmed. Instead, it would have been compelled to find that the utilities' local rate challenges were expressly supported by the Court's decision in *Santa Fe* and that the authorities relied upon by the Surface Board were inapplicable. The Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984) is not a license for circuit courts to abdicate their responsibilities under 28 U.S.C. §§ 2321 and 2342(5).[9]

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[9] *Western Coal Traffic League v. Surface Transportation Board*, 169 F.3d 775, 778 (D.C. Cir. 1999).

The failure of the court below to engage in precise judicial review has left in disarray and disorder a carefully crafted framework of Court rulings which have served the nation well and long in molding the manner in which railroads render their essential services. The direct consequence of the error of the court below is the creation of a new order wherein railroads, for the first time in history, are legally sanctioned to economically exploit their captive customers as a means to achieving their own adequate revenues. Pet. App. A-18-19.[10]

REASONS FOR GRANTING THE PETITION

This case raises what has been described as "the crucial issue of railroad regulation today."[11] The issue is whether a railroad can perpetuate its monopoly over a long-haul movement of goods by lawfully refusing to offer separate rates and services for the local, terminal portion of the longer movement (*i.e.*, the bottleneck). This case presents, in the context of surface transportation, the kinds of issues which were before the Court in the telecommunications field in *AT&T Corp. v. Iowa Utilities Board*, __ U.S. __, 119 S.Ct. 721, 748 (1999) (Breyer, J., concurring in part, dissenting in part). According to the Surface Board, in deciding for the railroads: "The Board reaffirmed existing law that a shipper could not, as a matter of course, demand that railroads treat their mine-to-generating plant coal shipments as a series of

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[10] Despite its recent eclipse as a litigant in disputes before the Court, the railroad industry continues as a major industrial force with annual revenues of $35 billion. *See* Morgan Stanley Dean Witter, *U.S. and the Americas Investment Research: Railroads*, at 3 (April 1, 1999).

[11] Richard A. Allen, *Court Decisions*, *supra*, at 355.

separate movements whose rates could be separately challenged."[12]

The "existing law" which the Surface Board claims to have reaffirmed in its decision (and which the court ignored), appears primarily in the decisions of the Court in *Santa Fe* and *Great Northern*, as well as in the related cases upon which the Surface Board relies.[13] These decisions articulate the legal rights and obligations of common carrier railroads under the Interstate Commerce Act. One reason why review by the Court is urgently needed is that not only does the decision of the Surface Board not reaffirm the law as defined by the Court, it so distorts and misapplies the Court's precedents that the result is a situation which would be abhorrent to the Congress -- the exploitation of monopolies by railroads.

In the proceedings before the Surface Board, the electric companies argued that the fundamental obligations of common carriers to the shipping public under the Act, as defined by the Court, required the bottleneck railroads to offer them local service at reasonable rates over the bottleneck routes. *Former* Title 49 provides broadly that railroads shall provide common carrier transportation to the public upon request. *Former* 49 U.S.C. § 11101(a). The Court has held that the common carrier obligation of railroads to carry all goods offered for transportation "is comprehensive and exceptions are not to be implied." *American Trucking Ass'ns v. Atchison, T. & S.F. Ry.*, 387 U.S. 397, 407 (1967). In

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[12] Docket Nos. 97-1081, et al., *MidAmerican Energy Co. v. Surface Transportation Board*, Joint Brief of Respondents Surface Transportation Board and United States of America, at i (July 28, 1997).

[13] *See, e.g., Thompson, Sloss-Sheffield*, and *Settle*, etc.

Thompson, the Court stated clearly that a railroad has a duty to offer rates and provide services "between points on its own lines." 343 U.S. at 558.

The decisions below eviscerate the common carrier obligations of railroads to carry freight between any points on their lines through the creation of new exception to that heretofore comprehensive obligation. The new exception which the Surface Board has created in this case holds that a railroad shall be relieved of its obligation to transport freight between any two points on its lines if it elects instead to offer a more comprehensive rate and service which includes the two points preferred by the customer.

There is no language in the Act which explicitly supports the new legal thesis of the Surface Board. As we have explained, the Surface Board instead relies upon several decisions of the Court to support its new exception. Because the Surface Board has misunderstood the Court precedent upon which it relies, its new exception to the common carrier obligation is, in fact, unsupported by the Court authorities upon which it relies and in clear conflict with other seminal rulings of the Court.

The lynchpin in the conflict between the law as set forth in the Court's decisions in *Settle, Great Northern*, etc. and the new interpretations of those decisions by the Surface Board lies in the Surface Board's failure to grasp the distinction between the transportation facts and circumstances before the Court in those cases and the circumstances of the utilities here. The rulings of the Court in *Settle, Great Northern*, etc. each dealt with "through routes and rates" under Section 10705 of the Act (*Former* 49 U.S.C. § 10705), a statutory

term of art.[14] Generally speaking, the Court ruled in these cases that through railroad rates could not be unbundled into their separate segments and separately challenged.

Here the utilities contemplate movements via a combination of contract and common carrier rates. While the utilities contemplate through movements or through shipments, the facts of their cases do not implicate through rates and routes or the law associated therewith. The Court has long recognized that through shipments may exist with "no through rate and no through route . . ." *Baer Bros. Mercantile Co. v. Denver & R.G.W Co.*, 233 U.S. 479, 490 (1914).[15] The Surface Board's error lies in its transposition of Court authorities precluding the segmentation of through rates to movements involving rates which are used for through shipments but which are not "through rates" as defined by the statute or as treated in the Court decisions upon which the Board erroneously relies.

Because the Surface Board has misapplied the Court's pronouncements on through rates in *Settle, Sloss-Sheffield, Great Northern,* etc. to the movements of the utilities, its decision stands in direct conflict with other long-standing Court precedent which directly authorizes rail rate challenges of the exact kind which the utilities attempted and which the Surface Board rejected as a consequence of its misplaced reliance on the through rate cases of the Court.

In *Santa Fe,* the Court considered rate challenge issues which were nearly identical to the issues involved in the

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[14] *See Through Routes and Through Rates*, 12 I.C.C. 163 (1907).

[15] *See also Pennsylvania R.R. v. Pub. Util. Comm. of Ohio*, 298 U.S. 170, 175 (1936).

utility cases. Specifically, in *Santa Fe*, the Court had before it separate railroad rates which were combined for through shipments. As the Court explains (*see* 279 U.S. at 771 n.1, 773 n.3), where a local railroad rate is used in conjunction with another separate rate, the second rate is referred to as a "proportional" rate, and is distinct from a through rate. In rejecting railroad arguments in this situation against a separate rate challenge to one of the segments in such a movement, Justice Brandeis explained:

> The Commission's power to declare rates unreasonable applies alike to all rates, be they joint, local, or proportional. The Commission may, and in controversies involving through rates often does, deal with one factor only of the combination of rates which make up the through rate, and that factor may be a proportional rate.

279 U.S. at 776.

The Court's ruling in *Santa Fe* clearly supports the lawfulness of the challenges made by the utilities against the local bottleneck rates.[16] Despite the unequivocal clarity of Justice Brandeis' formulation of the law, the Surface Board failed to heed it because of its misunderstanding of another Court decision. The Surface Board reads the later decision of the Court in *Great Northern* as requiring challenges of the entire origin-to-destination rate and not merely the local,

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[16] "[T]he overwhelming weight of authority now is to the effect that the Commission has jurisdiction to consider the lawfulness of a separately established rate on its own merits and without regard to the through charges." Charles W. Berry, *A Study on Proportional Rates*, 10 I.C.C. Pract. J. 545, 566 (1943).

bottleneck segment. Here, the Surface Board's error lies in its failure to appreciate that in *Santa Fe* the Court was treating the prospective lawfulness of a rate, which was the issue in the utilities' cases, whereas in *Great Northern* the issue was a refund for unlawful past charges. The Surface Board ignored this crucial distinction which the Court explained as follows:

> [The ICC] may determine whether a proportional constituting a part of a combination rate violates section 1 without passing upon the validity of the rate as a whole. *Atchison, T. & S.F. Ry. v. United States*, 279 U.S. 768, 776, 49 S.Ct. 494, 73 L. Ed. 947. But the commission may not order or permit payment of damages by way of reparation without finding that the amount of the charge was unjust and unreasonable.

Great Northern, 294 U.S. at 462-63.[17] The Surface Board's illogical reconciliation of the Court's holdings in *Santa Fe* and *Great Northern* so as to permit the exploitation of monopolies is hopelessly in error. The court below not only did not correct the Surface Board's error, it failed even to address it.

The United States, alone amongst major industrialized nations, enjoys efficient railroad transportation services provided by the private sector. Our efficient national rail transportation system, which is vital to the economy and the national defense, owes its robust existence in large part to the

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[17] The Surface Board compounds its error by attempting to further distinguish *Santa Fe* by its absurd claim that *Santa Fe* authorizes challenges to local rates by other railroads, but not by railroad customers. *See* Pet. App. B-22-23.

roughly 400 decisions of the Court which have spelled out the specifics of the regulatory provisions which the Congress cast in general terms.[18] As the Court has observed, the complexities of railroad regulation require the Court to partner with the Congress in order to foster an efficient and fair national transportation system by spelling out the details of the generalities set forth by Congress in the Act. *See United States v. Pennsylvania R.R.*, 323 U.S. 612, 616 (1945). The decisions below by interpreting the past rulings of the Court so as to sanction the exploitation of captive consumers, corrupt the regulatory system architected by Congress and defined by the Court. The issue is of considerable financial consequence to the nation.[19] Its mishandling by the lower court has spawned intense, and we submit, needless Congressional activity in the form of hearings[20] and remedial legislative proposals.[21]

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[18] *See* 1-3 Association of Interstate Commerce Commission Practitioners, *Abstracts of Supreme Court Decisions Interpreting the Interstate Commerce Act* (1954, 1965, 1972).

[19] The railroads claim that annual revenue of some $2.4 billion is at stake at their bottlenecks. *See* Pet. App. B-21 n.21.

[20] *See, e.g., Hearing on the Reauthorization of the Surface Transportation Board before the Senate Subcommittee on Surface Transportation and Merchant Marine*, 105th Cong. (March 2, 1999) (unprinted); *Reauthorization of the Surface Transportation Board: Hearings Before the Subcommittee on Transportation and Infrastructure (105-58)*, 105th Cong. (hearings held March 12, 1998, Apr. 12, 1998, and May 6, 1998); *Reauthorization of the Surface Transportation Board: Hearing Before the Subcommittee on Surface Transportation and Merchant Marine of the Committee on Commerce, Science, and Transportation*, 105th Cong. (hearing held March 31, 1998) (unprinted).

[21] *See Railroad Competition and Service Improvement Act of 1999*, S. 621, 106th Cong. § 5 (1999); *Surface Transportation Board*

(continued...)

A more efficient use of our governmental resources would be the Court's return to the railroad arena to review the application of its precedents to the changed circumstances of the industry. Such a review would address for the first time the issues which the lower court ignored and it also would resolve an important national transportation legal issue in the context of the careful framework laid down over many years by the Court.

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[21](...continued)
Reauthorization and Improvement Act of 1999, S. 747, 106th Cong. § 7 (1999); *Surface Transportation Board Amendments of 1998*, S. 2164, 105th Cong. § 8 (1998); *Railroad Shipper Protection Act of 1997*, S. 1429, 105th Cong. § 6 (1997); *see also* 145 *Cong. Rec.* S3485-S3486 (daily ed. March 25, 1999) (statement of Senator Hutchison); 145 *Cong. Rec.* S2674-S2678 and S2680-S2681 (daily ed. March 15, 1999) (Statements of Senators Rockefeller, Dorgan, and Burns); 143 *Cong. Rec.* S21018-S21020 (daily ed. Nov. 7, 1997) (statement of Senator Rockefeller). These bills have been introduced because the sponsoring members of Congress believe the Surface Board is misapplying current law.

CONCLUSION

As we have demonstrated, venerable precedents of the Court have been misused to undermine competition and promote monopoly. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 19, 1999

Supreme Court, U.S.
FILED

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No. 99-

IN THE

Supreme Court of the United States

WESTERN COAL TRAFFIC LEAGUE, *Petitioner,*

v.

SURFACE TRANSPORTATION BOARD
and UNITED STATES OF AMERICA, ET AL., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

APPENDIX

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Appendix A

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

MIDAMERICAN ENERGY COMPANY, PETITIONER,
WESTERN COAL TRAFFIC LEAGUE,
INTERVENOR ON APPEAL,
V.
SURFACE TRANSPORTATION BOARD;
UNITED STATES OF AMERICA, RESPONDENTS,
NORFOLK SOUTHERN RAILWAY COMPANY;
UNION PACIFIC CORPORATION; SOUTHERN PACIFIC
TRANSPORTATION COMPANY; CONSOLIDATED
RAIL CORPORATION; ASSOCIATION OF
AMERICAN RAILROADS, INTERVENORS ON APPEAL.

CENTRAL POWER & LIGHT COMPANY, PETITIONER,
WESTERN COAL TRAFFIC LEAGUE, INTERVENOR ON APPEAL,
V.
SURFACE TRANSPORTATION BOARD; UNITED STATES OF
AMERICA, RESPONDENTS,
NORFOLK SOUTHERN RAILWAY COMPANY; UNION PACIFIC
CORPORATION; SOUTHERN PACIFIC TRANSPORTATION
COMPANY; CONSOLIDATED RAIL CORPORATION;
ASSOCIATION OF AMERICAN RAILROADS,
INTERVENORS ON APPEAL.

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE,
PETITIONER, WESTERN COAL TRAFFIC LEAGUE,
INTERVENOR ON APPEAL,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, RESPONDENTS,

PENNSYLVANIA POWER & LIGHT COMPANY; NORFOLK SOUTHERN RAILWAY COMPANY; UNION PACIFIC CORPORATION; SOUTHERN PACIFIC TRANSPORTATION COMPANY; CONSOLIDATED RAIL CORPORATION; ASSOCIATION OF AMERICAN RAILROADS, INTERVENORS ON APPEAL.

UNION PACIFIC RAILROAD COMPANY; SOUTHERN PACIFIC TRANSPORTATION COMPANY, PETITIONERS,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, RESPONDENTS,

PENNSYLVANIA POWER & LIGHT COMPANY; NORFOLK SOUTHERN RAILWAY COMPANY; MIDAMERICAN ENERGY COMPANY; NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; UNION PACIFIC CORPORATION; CONSOLIDATED RAIL CORPORATION; ASSOCIATION OF AMERICAN RAILROADS; WESTERN COAL TRAFFIC LEAGUE, INTERVENORS ON APPEAL.

CONSOLIDATED RAIL CORPORATION, PETITIONER,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, RESPONDENTS

PENNSYLVANIA POWER & LIGHT COMPANY; NORFOLK SOUTHERN RAILWAY COMPANY; NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; UNION PACIFIC CORPORATION; SOUTHERN PACIFIC TRANSPORTATION COMPANY; ASSOCIATION OF AMERICAN RAILROADS;

WESTERN COAL TRAFFIC LEAGUE,
INTERVENORS ON APPEAL.

ASSOCIATION OF AMERICAN RAILROADS, PETITIONER,
V.
SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, RESPONDENTS,
PENNSYLVANIA POWER & LIGHT COMPANY; NORFOLK SOUTHERN RAILWAY COMPANY; NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; CSX TRANSPORTATION, INC.; UNION PACIFIC CORPORATION; SOUTHERN PACIFIC TRANSPORTATION COMPANY; CONSOLIDATED RAIL CORPORATION; WESTERN COAL TRAFFIC LEAGUE,
INTERVENORS ON APPEAL.

WESTERN COAL TRAFFIC LEAGUE, PETITIONER,
V.
SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, RESPONDENTS,
UNION PACIFIC CORPORATION; SOUTHERN PACIFIC TRANSPORTATION COMPANY; CONSOLIDATED RAIL CORPORATION; ASSOCIATION OF AMERICAN RAILROADS,
INTERVENORS ON APPEAL.

WESTERN RESOURCES, INC., PETITIONER,
WESTERN COAL TRAFFIC LEAGUE, INTERVENOR ON APPEAL,
V.
SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, RESPONDENTS,
CONSOLIDATED RAIL CORPORATION; UNION PACIFIC RAILROAD COMPANY; SOUTHERN PACIFIC TRANSPORTATION COMPANY; ASSOCIATION OF AMERICAN

RAILROADS; NORFOLK SOUTHERN RAILWAY COMPANY,
INTERVENORS ON APPEAL.

ASSOCIATION OF AMERICAN RAILROADS, PETITIONER,
V.
SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, RESPONDENTS,
PENNSYLVANIA POWER & LIGHT COMPANY; NORFOLK SOUTHERN RAILWAY COMPANY; WESTERN COAL TRAFFIC LEAGUE; NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; MIDAMERICAN ENERGY COMPANY; WESTERN RESOURCES,
INTERVENORS ON APPEAL.

CONSOLIDATED RAIL CORPORATION; PETITIONER,
ASSOCIATION OF AMERICAN RAILROADS,
INTERVENOR ON APPEAL,
V.
SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, RESPONDENTS,
PENNSYLVANIA POWER & LIGHT COMPANY; NORFOLK SOUTHERN RAILWAY COMPANY; WESTERN COAL TRAFFIC LEAGUE; NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; MIDAMERICAN ENERGY COMPANY,
INTERVENORS ON APPEAL.

UNION PACIFIC CORPORATION; SOUTHERN PACIFIC TRANSPORTATION COMPANY, PETITIONERS,
ASSOCIATION OF AMERICAN RAILROADS,
INTERVENOR ON APPEAL,

V.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, RESPONDENTS,
PENNSYLVANIA POWER & LIGHT COMPANY; NORFOLK SOUTHERN RAILWAY COMPANY; WESTERN COAL TRAFFIC LEAGUE; NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; MIDAMERICAN ENERGY COMPANY, INTERVENORS ON APPEAL.

WESTERN COAL TRAFFIC LEAGUE, PETITIONER,

V.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, RESPONDENTS,
CONSOLIDATED RAIL CORPORATION; ASSOCIATION OF AMERICAN RAILROADS; NORFOLK SOUTHERN RAILWAY COMPANY; UNION PACIFIC RAILROAD COMPANY; SOUTHERN PACIFIC TRANSPORTATION COMPANY, INTERVENORS ON APPEAL.

NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE; PETITIONER, WESTERN COAL TRAFFIC LEAGUE, INTERVENOR ON APPEAL,

V.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, RESPONDENTS,
UNION PACIFIC RAILROAD COMPANY; SOUTHERN PACIFIC TRANSPORTATION COMPANY; ASSOCIATION OF AMERICAN RAILROADS; CONSOLIDATED RAIL CORPORATION, INTERVENORS ON APPEAL.

MIDAMERICAN ENERGY COMPANY, PETITIONER,
WESTERN COAL TRAFFIC LEAGUE, INTERVENOR ON APPEAL,

v.

SURFACE TRANSPORTATION BOARD; UNITED STATES OF AMERICA, RESPONDENTS,
UNION PACIFIC RAILROAD COMPANY; SOUTHERN PACIFIC TRANSPORTATION COMPANY; ASSOCIATION OF AMERICAN RAILROADS; CONSOLIDATED RAIL CORPORATION, INTERVENORS ON APPEAL.

Nos. 97-1081, 97-1284, 97-1331, 97-1332, 97-1333, 97-1335, 97-1583, 97-2204, 97-2206, 97-2260, 97-2303, 97-2328, 97-2462 and 97-2464.

United States Court of Appeals,
Eighth Circuit.

Submitted Nov. 18, 1997.
Decided Feb. 10, 1999.

John H. LeSeur, Washington, D.C., argued, for Western Coal and intervenor shippers.

Nicholas DiMichael, Washington, D.C., argued, for National Ind. Transportation League and MidAmerican Energy.

William L. Slover, Washington, D.C., argued, for Central Power and Light.

Arvid E. Roach II, Washington D.C., argued, for the Railroads

Theodore K. Kalick of the STB, Washington, D.C., argued, for appellee.

Before WOLLMAN and HANSEN, Circuit Judges, and STEVENS,[1] District Judge.

WOLLMAN, Circuit Judge.

This is a consolidated action involving MidAmerican Energy Company (MidAmerican), Central Power & Light Company (CP & L), and Pennsylvania Power & Light Company (PP & L) (collectively the utilities). They petition for review of two orders of the Surface Transportation Board (the Board) dismissing their complaints against rail carriers. The carriers cross-appeal from the portion of the Board's decisions regarding reasonableness review of contractual shipping rates, arguing that the issue was not ripe for adjudication. We affirm the dismissal of the utilities' complaints. We dismiss the cross-appeal for lack of jurisdiction.

I.

MidAmerican ships coal approximately 750 miles from the Powder River Basin in Wyoming to its generating facility near Sergeant Bluff, Iowa. At the time it filed its complaint, MidAmerican was shipping the coal from origin to destination under contract with the Union Pacific Railroad (UP). This contract was scheduled to expire at the end of 1997. Anticipating the contract's expiration, MidAmerican began to compare UP's rates with those of other carriers to obtain the most favorable shipping rates. The only other carrier offering rail service originating in the Powder River Basin is the Burlington Northern Railroad (BN).

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[1] The HONORABLE JOSEPH E. STEVENS, United States District Judge for the Western District of Missouri, sitting by designation. Judge Stevens died on December 18, 1998. This opinion is consistent with the views he expressed at our post-argument conference.

BN does not service the final 90 miles of the route, a stretch from Council Bluffs, Iowa, to the generating station. Such a rail segment is commonly termed a "bottleneck," because it is serviced by only one carrier. Thus, MidAmerican could not directly compare the rates of BN and UP, as UP is the only carrier capable of shipping all the way to the generating station. To obtain a competitive rate for the 660-mile stretch from Wyoming to Council Bluffs, MidAmerican requested that UP provide a rate for its service over the bottleneck.

UP refused to provide the rate. Instead, it provided a rate for the entire route from the Powder River Basin to the generating station. This precluded MidAmerican from using BN as a carrier from Wyoming to Council Bluffs, essentially extending the bottleneck over the entire 750-mile route. Consequently, MidAmerican brought an action before the Board requesting a rate prescription over the 90-mile bottleneck segment. Although MidAmerican could not challenge a local "unit-train" rate for the bottleneck service, it asked the Board to prescribe a reasonable rate for the bottleneck if it found the published "class" rate for the 90-mile stretch unreasonable.[2]

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[2] A local unit-train rate is a published rate applicable to transport of a trainload of a specific good between two points on a carrier's line. A local class rate, on the other hand, is a published rate applicable to transport of a certain type of good in smaller quantities between two points on a carrier's line. Railroads must maintain class rates because of their common carrier obligation to transport goods to any point on their lines upon request by a shipper. *See Thompson v. United States*, 343 U.S. 549, 558, 72 S.Ct. 978, 96 L.Ed. 1134 (1952); *Westinghouse Elec. Corp. v. United States*, 388 F.Supp. 1309, 1311 (W.D.Pa.1975) (citing *New York v. United States*, 331 U.S. 284, 289-90, 67 S.Ct. 1207, 91 L.Ed. 1492 (1947)). Because it is more costly for carriers to offer service for unspecified quantities of goods, however, class rates are seldom used

(continued...)

CP & L transports coal from the Powder River Basin in Wyoming to its Coleto Creek generating station in Texas. Although both BN and UP offer rail service originating at the coal mines, the Southern Pacific Railroad (SP) is the only carrier from an interchange point in Victoria, Texas, to Coleto Creek.[3] UP's lines run from Wyoming to Victoria; BN's lines run from Wyoming to Fort Worth, Texas, where SP's service to Victoria and Coleto Creek begins. Therefore, UP and BN directly compete on the portion of the route from Wyoming to Forth Worth. SP and UP directly compete on the portion from Fort Worth to Victoria. After both BN and UP indicated a willingness to offer competitive rates for their service, CP & L requested that SP provide it a local unit-train rate for the segment from Fort Worth to Coleto Creek, which represented SP's longest haul, or for the bottleneck from Victoria to Coleto Creek.

SP refused to provide either rate, offering instead to provide a joint rate with UP. CP & L chose to obtain a unit-train rate from UP for service from Wyoming to Victoria, and to ship from Victoria to Coleto Creek under SP's class rate.[4]

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[2](...continued)
and are generally significantly higher over the same stretch of rail. *See Routing Restrictions over Seatrain Lines, Inc.*, 296 I.C.C. 767, 773 (1955); *Burlington Northern, Inc. v. United States*, 555 F.2d 637, 639 (8th Cir.1977) (noting that a class rate for coal shipment was more than double the unit-train rate).

[3] Based on stipulations entered into by the parties prior to the Board's hearing, we will disregard the fact that SP and UP have merged since the initiation of this action, resulting in UP's ability to offer unit-train service from Wyoming to Coleto Creek.

[4] SP's class rate for the coal shipment from Victoria to Coleto Creek was $19.95 per ton. At the Board's hearing, CP & L offered the
(continued...)

It could thus take advantage of neither the competition between UP and BN from Wyoming to Fort Worth, nor the competition between SP and UP from Fort Worth to Victoria. Subsequently, CP & L brought a complaint before the Board challenging the class rate as unreasonable and requesting a rate prescription for the bottleneck segment.[5]

PP & L can transport its coal from either of two mines in central Appalachia to its four generating facilities on the eastern seaboard. One of the mines is serviced by the Norfolk Southern Railroad (NS), the other is serviced by CSX. Neither NS nor CSX offers service all the way to PP & L's generating stations. NS transfers its shipments to the Consolidated Rail Corporation (Conrail) at an interchange point in Hagerstown, Maryland; CSX transfers to Conrail in Lurgan, Pennsylvania. Conrail thus controls a bottleneck that services PP & L's four generating facilities. To obtain competitive rates for the portion of the route serviced by NS and CSX, PP & L requested that Conrail provide it local unit-train rates from the interchange points to the generating stations.[6]

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[4](...continued)
testimony of eight expert witnesses that the highest reasonable rate for this stretch was $0.63 per ton, less than one-thirtieth of the actual class rate charged.

[5] Some shippers have eschewed the role of supplicant to the Board and have constructed connecting lines on their own. *See* Daniel Machalaba, *Tired of Costs, Delays of Railroads, Firms Lay Their Own Tracks*, Wall St.J., February 6, 1998, at A-1.

[6] As is by now well known, subsequent to the submission of this case the Board approved the division of Conrail between NS and CSX. *See* Bruce Ingersoll, *U.S. Approves Plan to Divide Conrail in Two*, Wall St.J., June 9, 1998, at A-3 (" 'This transaction, as conditioned, creates two strong competitors in the East that can handle the transportation needs
(continued...)

Conrail refused to provide such rates. Consequently, PP & L filed a complaint challenging Conrail's class rates from the interchange points to the stations and requesting that Conrail be required to provide local unit-train rates instead.[7] Conrail maintained that class rates were inappropriate for the route in question and asked the Interstate Commerce Commission (ICC)[8] for an opportunity to provide unit-train rates. The ICC ordered Conrail to do so in a decision dated January 17, 1995.

Rather than providing the rates, however, Conrail negotiated a joint rate for origin-to-destination service with CSX and a proportional rate for similar service with NS. As a result, Conrail, rather than PP & L, took advantage of the competition between NS and CSX for service from the central

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[6](...continued)
of an expanding economy,' said [Board] Chairwoman Linda Morgan"). *See also Norfolk Southern, CSX assume control of Conrail*, Railroad NewsWire (Aug. 27, 1998) <http://www2.trains.com/trains/News/News.shtml>. What effect the NS's acquisition of Conrail's lines in Pennsylvania will have on PP & L's transportation needs remains to be seen.

[7] Although Conrail admits that PP & L sent test shipments from the interchange points to its generating stations prior to filing the complaint, it denies that such shipments were sent using a class rate.

[8] The ICC was subsequently replaced by the Board in the ICC Termination Act of 1995, Pub.L. No. 104-88, 109 Stat. 803 (Dec. 29, 1995). The Termination Act also substituted the new Interstate Transportation Act for the earlier Interstate Commerce Act, both located at Subtitle IV of Title 49 of the United States Code. Pub.L. No. 104-88 §§ 102, 103, and 106. Although most of the provisions of the Interstate Commerce Act were re-enacted in the Interstate Transportation Act, the parties have relied, and we will base our decision, on the provisions of the old act because these cases were initiated before passage of the Termination Act.

Appalachian mines. PP & L then petitioned the Board for rate prescription on the bottleneck based on a renewed challenge to the class rates.

Although petitioners' cases involve distinct facts, they were consolidated by the Board for adjudication on common issues regarding "the extent to which bottleneck carriers may exert their market power over the routes and rates made available to shippers for needed rail service." *Central Power & Light Co. v. Southern Pac. Transp. Co.*, No. 41242, 1996 STB LEXIS 358, at *8-*9 (Surface Transp. Bd. Dec. 27, 1996) (*Bottleneck I*). Before reaching its decision, the Board solicited commentary on bottleneck regulation from all potentially affected shipper and carrier organizations. After oral argument and consideration of the submitted materials, the Board denied the utilities' requests for bottleneck relief.[9]

In considering the utilities' requests, the Board grappled with the tension between two competing policies expressed in the Interstate Commerce Act (the Act). Under 49 U.S.C. § 10701a(a) (1995) (now 10701(c)), rail carriers possess broad discretion in setting rates and routes. This reflects Congress's goal of deregulating the railroad industry and allowing railroads to achieve revenue adequacy by competing on a free-market basis. *See id.* § 10101a(3) (now 10101(3)) (providing for adequate revenues); *id.* § 10101a(1) (now 10101(1)) (allowing "the demand for services" to dictate

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[9] The complaints of MidAmerican and CP & L were dismissed in full; that portion of PP & L's complaint requesting rate prescription over the bottleneck segments was also dismissed. PP& L had amended its complaint to also challenge the joint and proportional rates with CSX and NS; the Board allowed this challenge to proceed, and the parties subsequently reached a settlement on that issue. We will thus address only the utilities' requests for rate prescription on the bottleneck segments in this appeal.

reasonable rail rates). Under sections 10101a(6) and 10701a(b) (now 10101(6) and 10701(d)), however, some rate regulation is required when carriers possess monopoly power over a section of rail. These provisions codify railroads' common carrier obligations, which require them to provide service at reasonable rates to all shippers upon request.

The Board resolved this tension in favor of the "rate freedom" of bottleneck carriers. Specifically, it held that bottleneck carriers satisfy their common carrier duties and thus comply with the Act by providing origin-to-destination service that includes the bottleneck, as in MidAmerican's case, or by providing joint or proportional service with other carriers that includes transportation over the bottleneck, as in CP & L's and PP & L's cases. In addition, the Board held that shippers may not challenge class rates as an "indirect basis for obtaining prescription of a local unit-train rate" for bottleneck segments. Subsequently, the utilities moved for clarification and reconsideration of the decision. The Board responded by issuing a second decision, granting in part the motion for clarification and denying the motion for reconsideration. *See Central Power & Light Co. v. Southern Pac. Transp. Co.*, No. 41242, 1997 STB LEXIS 91, at *28 (Surface Transp. Bd. Apr. 28, 1997) (*Bottleneck II*). The utilities appeal from both rulings.

II.

Before we address the specific issues raised in these cases, we briefly review the relevant history of railroad regulation. From its passage in 1887 until the mid-1970s, the Interstate Commerce Act provided for a strict regulatory framework to govern the federal railroad industry. This legislative approach resulted in an industry chronically plagued by capital shortfalls and service inefficiencies. See H.R.Rep. No. 96-1035, at 33 (1980), *reprinted in* 1980

U.S.C.C.A.N. 3978, 3978; *Coal Exporters Ass'n of United States v. United States*, 745 F.2d 76, 81 (D.C. Cir.1984).

To assure railroads greater freedom in establishing routes and rates, Congress modified the Act with the Railroad Revitalization and Regulatory Reform Act (4R Act), Pub.L. No. 94-210, 90 Stat. 31 (1976), and the Staggers Rail Act (Staggers Act), Pub.L. No. 96-448, 94 Stat. 1895 (1980). *See* H.R.Conf.Rep. No. 96-1430, at 79 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3978, 4110. These acts were intended to end "decades of ICC control over maximum rates and to permit carriers not having market dominance to set rates in response to their perception of market conditions." *Midtec Paper Corp. v. United States*, 857 F.2d 1487, 1506 (D.C. Cir. 1988).

Underlying these reform efforts was the notion that market forces would operate in the rail industry as they do in other spheres. Congress believed that free competition for rail services would ensure that consumer demand dictated the optimal rate level, while facilitating enough long-term capital investment to maintain adequate service. Congress was also mindful, however, that the free market would protect consumers only if there was "effective" competition. Therefore, the new enactments included provisions allowing regulatory intervention where competition would not control prices. *See* 4R Act § 101(b), 90 Stat. 31, 33; Staggers Act § 101(a), 49 U.S.C. § 10101a(6) (now 10101(6)); *Coal Exporters*, 745 F.2d at 81 n. 6.

Indeed, in bottleneck situations the Staggers Act actually "*increased* the ICC's regulatory power--by authorizing the agency to require railroads to enter into agreements to 'switch' other railroads' cars to and from shippers located along each other's lines...." *Baltimore Gas & Elec. Co. v.*

United States, 817 F.2d 108, 113 (D.C. Cir.1987); *see* 49 U.S.C. § 11103 (now 11102). After the 4R and Staggers Acts, the agency (previously the ICC, now the Board) is still required to use rate prescription and other remedies such as reciprocal switching arrangements to ensure reasonable shipping rates on bottlenecks. It is also responsible for ensuring that free competition is preserved to the greatest extent possible on non-bottleneck segments.

Congress's decision to deregulate the railroad industry has been largely successful. Experts for both sides in these cases have acknowledged that competition has led to more efficient routes, increased profits, better service, and an enhanced ability to attract capital investment. *See, e.g.*, Verified Statement of William J. Baumol & Robert D. Willig at 6-7, J.A. at 1111-12; Verified Statement of Alfred E. Kahn at 15-16, J.A. at 2931-32. However, the experts dispute the role of bottleneck rail segments in increasing profits and facilitating the overall revenue adequacy of the railroad industry.

III.

We have jurisdiction under 28 U.S.C. §§ 2321 and 2341 (Supp. 1998), which provide for review of the Board's decisions. Because Congress has entrusted the Board with interpreting and administering the Act, in reviewing its decisions we ask only whether they are " 'based on a permissible construction of the statute.' " *Caddo Antoine & Little Missouri R.R. Co. v. United States*, 95 F.3d 740, 746 (8th Cir. 1996) (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)). Notwithstanding this narrow standard of review, we must thoroughly examine the record and inquire whether the Board correctly applied the proper legal standards. *City of Cherokee v. ICC*, 641 F.2d 1220,

1226-27 (8th Cir. 1981). We are obligated to overturn the Board's decisions if there are "compelling indications that the Board's interpretations were incorrect." *GS Roofing Prods. Co. v. Surface Transp. Bd.*, 143 F.3d 387, 391 (8th Cir. 1998).

As the utilities and shipper organizations assert, carriers are bound both at common law and under the Act to "provide ... transportation or service on reasonable request" to any shipper. *GS Roofing*, 143 F.3d at 391. This duty not only requires carriers to provide service on their lines, but also requires rates for such service to be reasonable. *See Thompson*, 343 U.S. at 554, 72 S.Ct. 978; 49 U.S.C. § 10701a(b) (now 10701(d)).

As the Board and the railroads assert, however, there are significant limitations to the common carrier duties. It is usually at the discretion of the carrier how it wishes to satisfy its duty to provide rates and service. *See* 49 U.S.C. § 10701a(a) (now 10701(c)). Consequently, a carrier may in most circumstances provide service in the form of a joint rate with another railroad, such as Conrail did with CSX in PP & L's case, or a proportional rate, as Conrail did with NS. *See, e.g., Great Northern Ry. Co. v. Sullivan*, 294 U.S. 458, 463, 55 S.Ct. 472, 79 L.Ed. 992 (1935) (holding that a shipper may not recover damages based upon the carrier's portion of a rate if the carrier chooses to offer only a joint rate with another carrier, unless the entire joint rate is unreasonable); *Routing Restrictions*, 296 I.C.C. at 774 (stating that nothing in the Act requires carriers to establish routes over all possible interchanges).

Further, a carrier generally may provide common carrier service in a manner that protects its "long hauls." *See* 49 U.S.C. § 10705(a) (now 10705(a)). The Board may order

a carrier to provide service over a shorter haul than it wishes only if the Board first makes specific findings under the Act. *See id.* § 10705(a)(2). Thus, a carrier such as UP may normally choose to provide service to a shipper such as MidAmerican over a route longer than the 90 miles from Council Bluffs to Sergeant Bluff, unless the longer route would be "unreasonably long" or inefficient. *See Thompson*, 343 U.S. at 559-60, 72 S.Ct. 978 (holding that the ICC was required to make findings regarding the short-hauling exceptions before compelling a railroad to provide service over a shorter portion of rail than it wished).

Therefore, the Act protects both shippers and carriers. It guarantees that shippers will receive rail service at reasonable rates, and it allows carriers to provide such service in a manner that achieves revenue adequacy.

The Board has recognized that an important part of achieving revenue adequacy is differential pricing. *See Consolidated Rail Corp. v. United States*, 812 F.2d 1444, 1453-54 (3d Cir.1987) (citing *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985)). This is a practice by which carriers charge a higher mark-up on rail segments where demand elasticity is low, such as bottlenecks, to compensate for low mark-ups on competitive segments. *See Coal Rate Guidelines*, 1 I.C.C.2d at 526-27. Therefore, "services may be priced above their attributable costs according to observable market demand, but only to the extent necessary to cover total costs, including return on investment of an efficient carrier." *Id.* at 533-34. Accordingly, in reviewing the reasonableness of bottleneck rates, the Board allows bottleneck carriers to charge up to stand-alone cost (SAC), a level

that is significantly higher than marginal cost.[10] *See id.* at 526-29.

In the present case, the Board determined that exploiting bottlenecks by refusing to provide separately challengeable bottleneck rates also assists carriers in achieving revenue adequacy. Specifically, in the MidAmerican case, allowing UP to provide only an origin-to-destination rate enables it to charge up to SAC over the entire 750-mile route, rather than just over the 90-mile section from Council Bluffs to Sergeant Bluff. Were UP required to provide a separate bottleneck rate, it would be forced to charge lower competitive rates from the mine to Council Bluffs. Similarly, in the CP & L and PP & L cases, allowing the bottleneck carriers to negotiate through rates and joint rates for origin-to-destination service enables them, rather than the shippers, to take advantage of the competition between non-bottleneck carriers. After negotiating competitive rates for the non-bottleneck carriage, the bottleneck carriers will be able to charge the bottleneck shippers up to SAC for the entire route, rather than just over the bottleneck. *See Western Resources, Inc. v. Surface Transp. Bd.*, 109 F.3d 782, 787 (D.C. Cir. 1997) (describing the behavior of bottleneck carriers).

Based on these economic factors and extensive expert testimony, the Board concluded that the Act did not require carriers to provide separate bottleneck rates. Regardless of how we would resolve the tension in the Act if we were to

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[10] Stand-alone cost represents the minimum amount that a hypothetical carrier, or the shipper itself, would have to spend to build a new rail line to compete over the bottleneck segment. *See Coal Rate Guidelines*, 1 I.C.C.2d at 528-29. This measure better allows railroads to achieve true revenue adequacy, because it takes into account profits and the cost of long-term capital investment, while marginal cost does not. *See id.* at 526.

independently rule on the utilities' claims, we cannot say that the Board's interpretation was incorrect. The Board's considerable expertise in the economic underpinnings of the railroad industry is entitled to a great degree of deference, and its decision to allow carriers to determine how they wish to fulfill their duties under the Act is consistent with the current national railroad policy of maximizing carrier discretion in setting routes and rates. Because the utilities have not demonstrated that the Board's rulings were incorrect, we affirm the Board's dismissal of the utilities' complaints.

We note that the Board's decisions explicitly provide the utilities three potential avenues of recourse. First, bottleneck shippers may obtain contracts for service over the competitive segments of rail. *See Bottleneck I*, 1996 STB LEXIS 358, at *30-*31; *Bottleneck II*, 1997 STB LEXIS 91, at *22. Once a contract is secured, the bottleneck carrier will be required to provide local service over the bottleneck in light of its common carrier obligations. *Bottleneck II*, at *22. Because such service will be actually "held out" to bottleneck shippers,[11] the Board will be required to review the bottleneck rate for reasonableness. *See Bottleneck I*, at *12-*14 (refusing to review class rates over the bottlenecks in these cases because the carriers did not hold out such rates for bulk coal shipments). For an example of the Board's willingness to

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[11] Historically, a shipper could not challenge a rate unless the carrier held out service at that rate. *See Routing Restrictions*, 296 I.C.C. at 774-75 (stating that shippers cannot force carriers to ship over shorter rail segments than they wish unless carriers hold out such service to the public). If a carrier denied holding out service for a given rail segment, however, a shipper could show that the carrier implicitly held out service. Shippers did this by showing either that the carrier was required to provide such service under its common carrier obligations, or by demonstrating an "established interchange" for such service with another carrier. *See id.* at 774.

review bottleneck rates that are held out to shippers, *see Burlington Northern Railroad Company v. Surface Transportation Board*, 114 F.3d 206, 215 (D.C. Cir. 1997) (*West Texas II*) (engaging in reasonableness review of a bottleneck rate, and finding a rate of $19.36 per ton for coal unreasonable).

Indeed, as soon as a bottleneck shipper obtains a contract for non- bottleneck carriage, bottleneck carriers would have no incentive to refuse to provide a local rate for bottleneck service. The Board's regulations clearly allow bottleneck carriers to charge up to SAC for bottleneck service, and carriers would not attempt to charge more than SAC because they would immediately be subject to rate reasonableness review by the Board. *See Western Resources, Inc. v. Surface Transp. Bd.*, 109 F.3d at 789-90 (noting that bottleneck carriers will likely negotiate reasonable rates with bottleneck shippers to avoid Board review of bottleneck rates).

Second, if the utilities can adequately demonstrate an absence of effective competition[12] over the entire origin-to-

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[12] Under the Act, effective competition exists if the complaining shipper cannot establish the existence of market dominance under the criteria set forth in 49 U.S.C. § 10709(d) (now 10707(d)). Under that provision, a carrier has market dominance if its revenue to variable cost percentage for the rail segment in question is greater than 180 percent. *See* 10709(d)(2); *Midtec*, 857 F.2d at 1504. If the shipper can make this showing, the carrier must respond by demonstrating adequate "competitive alternatives" that provide effective competition. *See Metropolitan Edison Co. v. Conrail*, 5 I.C.C.2d 385, 410-16 (1989) (discussing and dismissing carriers' argument that intermodal, geographic, and product competition prevented it from having market dominance).

There is substantial evidence that bottleneck carriers possess

(continued...)

destination route, they may challenge the origin-to-destination rate provided by the carrier. *See Bottleneck I*, at *38-*39 (noting that PP & L properly challenged the joint and proportional rates that Conrail negotiated with CSX and NS); *Bottleneck II*, at *9 (same). Although this would not allow the utilities to take advantage of the competition over the non-bottleneck segments, it would ensure that carriers will exploit bottleneck segments only to the extent needed to achieve revenue adequacy. For the Board's rate review authority was meant to ensure that " 'rail rate flexibility would not result in [captive] shippers bearing a disproportionate share of responsibility for the needed improvements in the railroads' financial position.' " *Midtec*, 857 F.2d at 1506 (quoting *Arkansas Power & Light Co. v. ICC*, 725 F.2d 716, 719 (D.C. Cir. 1984)). *See also Coal Rate Guidelines*, 1 I.C.C.2d at 523-24 (stating that a bottleneck shipper must not be forced to "subsidize long-term excess capacity" and pay for "facilities or services from which it derives no benefit").

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[12](...continued)
market dominance. *See, e.g., West Texas II*, 114 F.3d at 211 (summarily affirming the Board's holding that there was an absence of effective competition over a bottleneck). Conrail was found to be market dominant over its bottleneck in a proceeding by PP & L nearly fifteen years ago. *See Pennsylvania Power & Light Co. v. Consolidated Rail Corp.*, No. 38186S (ALJ July 24, 1984). Numerous scholars have declared that consistent price discrimination is a strong indication that there is no effective competition in the market reaping higher returns, in this case, the bottleneck segments. *See Coal Exporters*, 745 F.2d at 91 (citing 2 P. Areeda & D. Turner, *Antitrust Law* 342; R. Bork, *The Antitrust Paradox* 395 (1978); R. Posner, *Antitrust Law* 63 (1976); and L. Sullivan, *Handbook of the Law of Antitrust* 89 (1977)). Indeed, the Board appeared to acknowledge that the bottleneck segments lack effective competition when it stated that its task in these cases was to ascertain the extent to which bottleneck carriers may "exert their market power...." *Bottleneck I*, at *3.

Third, the utilities could request relief under the competitive access rules, 49 C.F.R. § 1144.5 (1997), over the entire origin-to-destination route. *See Bottleneck I*, at *20-*26; *Bottleneck II*, at *6. To invoke these rules, the utilities would be required to show that the carrier engaged in "anticompetitive" conduct. *See Bottleneck I*, at *26; *Midtec*, 857 F.2d at 1507; 49 C.F.R. § 1144.5(a)(1). Potential relief under the competitive access rules would include ordering the bottleneck carrier to enter into a switching arrangement with another carrier or prescribing a new through route over the bottleneck. 49 C.F.R. § 1144.5(a). Admittedly, invoking these rules has proved difficult for shippers, but the Board has indicated an intent to enforce the rules to their fullest extent in the future. *See Bottleneck I*, at *22, *26.

The utilities rely on *San Antonio v. Burlington Northern*, 355 I.C.C. 405 (1976), *aff'd sub nom. Burlington Northern, Inc. v. United States*, 555 F.2d 637 (8th Cir.1977), for the argument that they should be allowed to challenge class rates for the bottleneck segments. In that case, however, a utility brought an action to the Commission requesting rate prescription over a complete origin-to-destination shipment. *See* 555 F.2d at 639. Like the D.C. Circuit's recent decision in *West Texas II*, 114 F.3d 206 (D.C. Cir. 1997), *San Antonio* simply demonstrates that the Act allows shippers to challenge origin-to-destination rates, regardless of how carriers choose to provide such service. In the present cases, the shippers did not challenge complete origin-to-destination rates, but challenged class rates over a segment of the route as an indirect means of preventing the carriers from exploiting bottleneck profits. That "creative rate reduction strategy" undermined the national railroad policy of deferring to carrier discretion in setting routes and rates.

Nothing in the Act explicitly requires carriers to provide separate local rates for bottleneck service. Furthermore, requiring carriers to provide separately challengeable rates on bottlenecks would prevent them from exploiting bottlenecks and charging rates up to SAC for complete origin-to- destination service. In the Board's view, this would impede the industry's efforts to achieve revenue adequacy, which is necessary for long-term capital investment and, ultimately, for a safe and efficient rail system. The Board therefore properly reconciled the competing policies of the Act when it deferred to carrier discretion in setting routes and rates and held that carriers are not required to provide separately challengeable bottleneck rates.

The Board's dismissal of the utilities' complaints is affirmed.

IV.

The railroads cross-appeal the Board's determination that it may assess the reasonableness of bottleneck rates as soon as the utilities obtain contract rates over the non-bottleneck segments. Under Article III of the Constitution, we may only rule on existing cases or controversies. Because none of the utilities possesses a contract rate for non-bottleneck service, none has an existing claim for bottleneck rate review on this basis. As the railroads themselves point out, the Board's ruling on the contract issue presents no live controversy for adjudication. Thus, we dismiss the cross- appeal for want of jurisdiction.

APPENDIX B

B-1

SERVICE DATE - DECEMBER 31, 1996

This decision will be included in the bound volumes of the printed reports at a later date.

SURFACE TRANSPORTATION BOARD[1]

No. 41242

CENTRAL POWER & LIGHT COMPANY
v.
SOUTHERN PACIFIC TRANSPORTATION COMPANY

No. 41295

PENNSYLVANIA POWER & LIGHT COMPANY
v.
CONSOLIDATED RAIL CORPORATION

No. 41626

MIDAMERICAN ENERGY COMPANY
v.
UNION PACIFIC RAILROAD COMPANY

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (the ICCTA), abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board), effective January 1, 1996. Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. The captioned proceedings were pending with the ICC prior to January 1, 1996, and concern functions which are now under this Board's jurisdiction. Accordingly, references in this decision are to the old law (West Ed. 1995) unless otherwise indicated.

and
CHICAGO AND NORTH WESTERN RAILWAY COMPANY

Decided: December 27, 1996

The Board grants, in whole or in part, motions to dismiss each of these cases on the ground that the defendant carriers are not required to publish local rates for the involved traffic. The Board also explains how it will handle competitive access and rate reasonableness issues governing future requests for bottleneck segment rate relief.

DECISION

BY THE BOARD:

BACKGROUND

These cases raise common issues concerning the rail transportation of coal, in trainload or unit-train shipments, to a utility's coal-fired electric generating station that is served by only one rail carrier over a bottleneck segment.[2] In each case, the bottleneck carrier now delivers coal to the generating station either in single-line service from the mine currently supplying the utility's coal, or in interline service with another rail carrier over an established through route. In No. 41242 (the CP&L case) and No. 41626 (the MidAmerican case), the utilities wish to ship coal from the Powder River Basin in Wyoming using different routings and rates than those presently available to them. In No. 41295 (the PP&L case), the utility desires to shift from Pennsylvania coal

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[2] A **bottleneck segment** is the portion of a rail movement for which no alternative rail route is available.

transported by the bottleneck carrier in single-line service to coal from West Virginia or Kentucky mines served only by other carriers, with delivery by the bottleneck carrier. PPL seeks rates for this multi-carrier transportation.

To counter what they perceive as the bottleneck carriers' present undue market power over their coal shipments, the utilities each seek to have their coal transported over shipper-designated routes under separately set component rate factors. The utilities, relying upon a rail carrier's obligations under 49 U.S.C. 10742 and 11101(a) to maintain reasonable interchanges with other rail carriers and accept all traffic reasonably tendered to them, seek to have each bottleneck carrier provide (and if necessary have the Board prescribe) a trainload or unit-train local rate for transportation over the bottleneck segment of the designated route from an interchange point of the shipper's choosing. Although origin-to-destination service requiring more than one rail carrier typically uses proportional or joint rates,[3] the utilities seek to have a non-bottleneck rail carrier transport the coal to the interchange point under a separate, unrelated rate. According to the utilities, breaking the transportation movement into separate components and obtaining a local rate over the bottleneck segment (set by prescription, if necessary) would

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[3] A **local rate** is a rate for transportation originating and terminating on the carrier's line. A **joint rate** is a unitary (single-factor) rate set by mutual agreement between the participating carriers that is applied to a **through movement**, a movement that originates on one carrier's line and terminates on another's. A **proportional rate** is set by a single carrier for applicability only to its portion of a through movement. A proportional rate is different from a local rate because it is expressly conditioned to apply only to traffic having a prior or subsequent move on another carrier through a specified interchange point. A proportional rate is also different from a joint rate because it does not involve participation by any other carrier in setting or applying the rate.

enable them to secure (likely by contract pursuant to 49 U.S.C. 10713 (now 49 U.S.C. 10709)) competitive rate and service offerings for the non-bottleneck segment that they allegedly cannot receive now, and thereby work to satisfy the statutory directive "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. 10101(a)(1).

In each instance, the bottleneck carrier has refused the utility's request to establish a local unit-train or trainload rate, and each utility has filed a rate complaint challenging the only rate available for local service over the bottleneck segment -- a single-car local rate. Asserting that this rate is unreasonably high as applied to its traffic, the utility in each case has asked the Board to prescribe a maximum reasonable local rate for trainload or unit-train movements of coal between the particular interchange points and generating stations at issue.

The defendant railroads have moved to dismiss the rate complaint in each case. In two of the cases, the bottleneck carriers argue that, because they already provide single-line service (MidAmerican) or have designated an interchange for through-route service (CP&L) for the utilities' traffic from the Powder River Basin to the respective generating stations, they are not required to provide service over any other routes, particularly where they would be deprived of their long-haul service that is protected by 49 U.S.C. 10705(a)(2). The carriers further argue that the Board may intervene under 49 U.S.C. 10705(a)(1) to prescribe new routes only where complainants have satisfied the requirements of the competitive access rules at 49 CFR 1144.5, and that the utilities have failed to present any evidence under those rules to warrant such regulatory intervention. See Intramodal Rail Competition, 1 I.C.C.2d 822 (1985), aff'd sub nom. Baltimore Gas &

Electric Co. v. United States, 817 F.2d 108 (D.C. Cir. 1987) (Baltimore Gas).[4]

The bottleneck carriers further argue that, even if they offered (or were ordered by the Board to provide) transportation over the utilities' desired routes, the pending rate complaints must still be dismissed for several reasons. First, they argue that the utilities cannot challenge a single-car local rate, because the utilities' traffic is not local and does not move in single-car shipments. Second, the carriers maintain that they have the prerogative under 49 U.S.C. 10701a (now 49 U.S.C. 10701(c)) to determine the type of rate to offer on through traffic and cannot be forced to establish a separately challengeable local unit-train or trainload rate for the bottleneck segment of the through movements involved here. Third, they assert that, if they choose to establish joint or proportional unit-train rates (as Conrail has in the PP&L case for projected coal shipments from West Virginia and Kentucky), the utilities cannot obtain a reasonableness determination and rate prescription confined to the bottleneck segment alone, but instead must challenge the reasonableness of the entire origin-to-destination movement. See Louisville & N.R.R. Co. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 231-34 (1925) (L&N); Great Northern Ry. v. Sullivan, 294 U.S. 458, 462-63 (1935) (Great Northern); and Metropolitan Edison Co. v. Conrail, 5 I.C.C.2d 385, 400-10 (1989) (Met Ed).[5] Permitting segmented reasonableness determina

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[4] In PP&L, Conrail has moved to dismiss the complaint seeking prescription of a local rate, but not insofar as it challenges the rates that Conrail has set over the through routes that it has established with its connecting carriers. Unlike CP&L and MidAmerican, in PP&L, there is no dispute over the routes provided for service.

[5] The railroads state that, although they are not required to do so, they may establish local rates that they designate for use in through

tions on through movements would, according to the railroads, directly threaten the industry's ability to price differentially and recover its full costs, and thereby defeat Congress' directive to "promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues." See 49 U.S.C. 10101a(3); Coal Rate Guidelines, Nationwide, 1 I.C.C.2d 520 (1985) (Coal Rate Guidelines), aff'd sub nom. Consolidated Rail Corp. v. United States, 812 F.2d 1444 (3d Cir. 1987).

In opposing dismissal, the utilities respond that the competitive access rules are not implicated in MidAmerican and CP&L because complainants seek only local service, not the prescription of a through route. The utilities further argue that, even if through-route relief were required, relief should be available in these cases because the bottleneck carriers' refusal to establish local rates from the requested interchange points effectively forecloses competitive service over other routes and is, by itself, sufficient evidence of anticompetitive conduct to support a through-route prescription under the competitive access rules.

The essence of the utilities' position, however, is that they have the right to deal separately with each carrier that participates in the movement of their traffic and, as a result, that they have the right to a separately challengeable local rate in each of these cases. The utilities argue that the principles of L&N and Great Northern (requiring a reasonableness challenge to the entire through rate) do not extend to inde-

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traffic, Thompson v. United States, 343 U.S. 549, 556-59 (1952); if they do, however, the carriers argue that such rates are also immune from a separate reasonableness challenge under the rationale of L&N/Great Northern, notwithstanding contrary suggestions in Met Ed, 5 I.C.C.2d at 406-07. Comments of the Association of American Railroads (AAR), October 15, 1996, at 13-15 & n.12.

pendent local rates, and should not be applied in any event when transportation over the non-bottleneck segments will be provided by rail contract not subject to our jurisdiction, 49 U.S.C. 10713(i)(1) (now 49 U.S.C. 10709(c)(1)), or when to do so would thwart Congress' more recent directives in 49 U.S.C. 10101a(1) to allow competition to establish reasonable rates.

While the facts in each case vary, the three cases pose common issues of industry-wide significance for rail carriers and shippers concerning the extent to which bottleneck carriers may exert their market power over the routes and rates made available to shippers for needed rail service. Accordingly, by decision served August 27, 1996, and supplemented on September 18, 1996, we requested comments from all interested or potentially affected persons on the broader legal issues and policy implications presented by these complaints.

Comments and rebuttal were filed with us on October 15 and October 25, 1996, respectively, and we held an oral argument on October 31, 1996.[6] Having considered the pleadings in the individual proceedings, and the recent comments, rebuttal, and oral presentations, we will now act in the three "bottleneck" cases before us.[7] In the first section of our discussion, we address the principles that we conclude

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[6] We note that, while the railroad industry was united in its position, the shippers were not; several took positions at odds with those advanced by the utilities.

[7] We note that one of the issues that we raised involved the question of "abstractness." During the oral argument, both the shippers and the carriers indicated that they recognize that a shipper requesting a rate must provide sufficient information to enable the railroad to respond. Accordingly, we will not address this issue further.

govern the cases at hand; in the second section, we review the law and policy and our approach to future requests for bottleneck-segment rate relief; and in the third section, we examine in more detail each of the three complaints before us here.

DISCUSSION

I. -- Governing Principles.

Central to the disposition of each case is whether the bottleneck carriers properly refused to establish a "local" unit-train or trainload rate over the bottleneck segment. As a threshold matter, railroads are required, under their common carrier obligation, to establish rates and routes to move a shipper's traffic from origin to destination, 49 U.S.C. 11101(a), and to interchange traffic if doing so is required to complete the transportation, 49 U.S.C. 10742. Thus, if a utility seeks coal from an origin that is not served by the destination bottleneck carrier, either directly or under an existing through route, the bottleneck carrier cannot refuse to provide interline service to the destination generating station. Instead, under its common carrier and interchange obligations, the bottleneck carrier must accept this traffic from a new origin at a reasonable interchange point and establish a rate over the bottleneck segment to complete the transportation.[8]

However, in providing service from a mine to a utility plant--either by itself or in interline service with another carrier--the bottleneck carrier is not required to establish a

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[8] That is why the ICC, by order served January 17, 1995, ordered Conrail to file rates to be used for the interline shipments from the new origins from which PP&L sought coal.

local rate for the bottleneck segment. Under 49 U.S.C. 10701a(a) (now 49 U.S.C. 10701(c)), a rail carrier "may establish any rate for transportation or other service" that it provides, and, pursuant to that initiative, may choose to establish local, joint, or proportional rates. See, e.g., United States v. Illinois C.R.R., 263 U.S. 515, 522 (1924); Met Ed, 5 I.C.C.2d at 409. The utilities' argument that they have a right to a local rate rests on the mistaken belief that, under the common carrier obligation, a carrier must hold out to provide **all** possible rates and services that a shipper may request. In fact, where a destination bottleneck carrier establishes proportional or joint rates for unit-train or trainload coal transportation to the generating station, it is not required to provide a local unit-train coal rate as well for transportation that is not local to the bottleneck carrier.[9]

The fact that a bottleneck carrier may have transported, for test-burn or other purposes, an isolated coal shipment pursuant to a single-car local class rate would not

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[9] Reliance by coal shippers on cases such as Routing Restrictions Over Seatrain Lines, Inc., 296 I.C.C. 767 (1953) is misplaced. (See, e.g., Comments of Western Coal Traffic League (WCTL), October 15, 1996, at 12-14.) At most, as WCTL appears to concede on rebuttal (WCTL Rebuttal, October 25, 1996, at 12-13), Routing Restrictions indicates that, where a through route does not exist, a shipper could obtain and pay "separate local rates" to each rail carrier required for its transportation. 296 I.C.C. at 774-75. Routing Restrictions is not relevant, however, once a bottleneck carrier has created a through route by establishing joint or proportional rates for the underlying through service. Once a carrier offers rates sufficient to complete the through traffic, it need not offer, nor does a shipper have the right to insist upon, separate local service and rates as well. Moreover, even in situations where local rates have been established and are potentially available to construct a through rate and route, Routing Provisions holds that local rates cannot be used in that manner unless the carrier acquiesces. 296 I.C.C. at 774-75, 783-85.

change that result, nor provide an indirect basis for obtaining prescription of a local unit-train rate for the utility's regular, high-volume through shipments. Where the bottleneck carrier has established joint or proportional rates for through transportation, it need not also hold out local service for that traffic, and we do not intend to entertain complaints designed artificially to produce that end.[10]

Further, in establishing through routes and rates to complete the transportation of the utility's coal to the generating station, the bottleneck carrier may, in the first instance, determine the interchange through which that service will be provided. The carrier is not required to open an additional route through a different interchange simply because the shipper asks it to do so, without regard to the criteria of 49 U.S.C. 10705(a). Through the Railroad Revitalization and Regulatory Reform Act of 1976 (4-R Act)[11] and Staggers Rail Act of 1980 (Staggers Act),[12] Congress ended the "open-routing" system that effectively had required rail carriers to establish and maintain interchanges and through routes "on practically all combinations of railroad tracks between two points." Baltimore Gas, 817 F.2d at 110. Instead, as an integral part of Congress' goal of revitalizing the rail industry, these statutes largely freed carriers to "rationalize their route structures making maximum use of efficient routings and eliminating others." Interchange Provisions at Jackson-

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[10] A challenge to a single-car rate would be essentially irrelevant to the unit-train service regularly involved in movements from coal mines to utility plants. Therefore, we do not intend to entertain challenges to single-car rates unless they are the rates actually moving the traffic or intended to move the traffic.

[11] Pub. L. No. 94-210, 90 Stat. 31 (1976).

[12] Pub. L. No. 96-448, 94 Stat. 1895 (1980).

ville, FL, SCL and SRS, 365 I.C.C. 905, 916 (1982); see also, e.g., Baltimore Gas, 817 F.2d at 110-15; Western Railroads--Agreement, 364 I.C.C. 635, 649 (1981).

Giving the shippers the routing control that they seek here would defeat the statutory provisions protecting each railroad's right to determine, at the outset, which reasonable through routes it will use to respond to requests for service. 49 U.S.C. 10705(a)(1), (a)(2). These provisions, taken as a whole, provided the basis for the competitive access rules. Under those rules, a carrier does not have unlimited discretion as to how to provide service requested by a shipper. Shippers, however, may not unilaterally dictate the terms of service through artifices such as a request for a local rate for what is clearly a through movement. Rather, shippers dissatisfied with a railroad's response to a request for service must seek relief through the competitive access rules.

Thus, while the Board may prescribe additional through routes "when it considers it desirable in the public interest," 49 U.S.C. 10705(a)(1), under our competitive access rules we do so only where it "(i) is necessary to remedy or prevent an act that is contrary to the competition policies of 49 U.S.C. 10101a or is otherwise anticompetitive and (ii) otherwise satisfies the criteria of 49 U.S.C. 10705 and 11103, as appropriate." 49 CFR 1144.5(a)(1). As first interpreted in Midtec Paper Corp. v. Chicago & N.W. Transp. Co., 3 I.C.C.2d 171, 181 (1986), aff'd sub nom. Midtec Paper Corp. v. United States, 857 F.2d 1487 (D.C. Cir. 1988) (Midtec), to obtain access relief, including the prescription of through routes, shippers must show that a carrier "has used its market power to extract unreasonable terms on through movements, or, [] because of its monopoly

position, has shown a disregard for the shipper's needs by rendering inadequate service."[13]

As a result, under the competitive access rules and the statutory criteria from which they are derived (see 49 U.S.C. 10705), carriers may generally protect their single-line or existing through routes by declining to establish other possible through routes, unless it can be shown that the alternative routes sought are more efficient, or that the carriers have exploited their market power by providing inadequate service over their existing through routes.[14] Because the utilities in each of the cases have premised their requested relief on the

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[13] In addition to the prescription of new through routes, two other access remedies are available: (1) reciprocal switching--service in which a bottleneck carrier, for a fee, transports the cars of the non-bottleneck carrier over its lines to destination, thereby permitting the non-bottleneck carrier to establish single-line rates for customers to which it does not have direct access; and (2) terminal trackage rights--full access, for a fee, permitting the non-bottleneck carrier actually to provide service over the lines of the bottleneck carrier and thereby complete its own single-line service. Although 49 CFR 1144.5(a) specifically addresses only through-route and reciprocal switching remedies, the same considerations would apply to requests for terminal trackage rights. Midtec, 3 I.C.C.2d at 178; 857 F.2d at 1494, 1501-02.

[14] The shippers' reliance on 49 U.S.C. 10747(a)(1) (previously section 10763(a)(1)) (e.g., WCTL Reply, October 25, 1996, at 16-17) is misplaced. That provision provides only that where a carrier has more than one established through route between two points:

> a shipper should be permitted to choose the route over which its traffic will be shipped. It does not require that a carrier maintain two routes in order to give a shipper that choice.

Changes in Routing Provisions-Conrail-July 1981, 365 I.C.C. 753, 772 (1982), vacated on other grounds, Chesapeake & O. Ry. v. United States, 704 F.2d 373 (7th Cir. 1983).

asserted obligation of a carrier to establish local rates, they have either not addressed the requirements of the competitive access rules or addressed them inadequately. Simply establishing that a carrier refused to open an additional through route at the shipper's desired interchange point is not, by itself, evidence of anticompetitive conduct sufficient under those rules to warrant the prescription of that route.[15] It has long been held that the statute and the competitive access rules neither direct nor were meant to require the government to create additional, competitive rail through routes simply upon demand. Baltimore Gas, 817 F.2d at 114-15.

The utilities argue that this well-established regulatory framework should give way in light of Congress' general directive in the Staggers Act "to allow, to the maximum extent possible, competition and the demand for services to establish reasonable rates for transportation by rail." 49 U.S.C. 10101a(1). We take seriously the procompetitive objectives of the statute. However, notwithstanding that general language, Congress chose not to provide for the open routing that shippers seek here. To the contrary, as discussed above, Congress retained and strengthened the specific

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[15] See, e.g., Docket No. 41242, Reply of Central Power & Light Company to Motion to Dismiss of Southern Pacific Transportation Company, October 14, 1994, at 14-15. Shippers elsewhere argue that not providing local-rate service over alternative routes permits bottleneck carriers to improperly maximize profits on their existing routes through a "classic vertical [price] squeeze," anticompetitive conduct that should warrant access relief under the regulations. E.g., Comments of Western Resources, Inc., October 15, 1996, Testimony of George H. Borts at 4. The statute, however, already provides maximum rate regulation that would act to protect shippers against excessive rates. Thus, a shipper may not rely solely on the fact that a bottleneck carrier is maximizing its profits, to the extent that the existing regulatory framework permits, as the basis for competitive access relief.

statutory provisions allowing carriers to select their routes and to protect their long-hauls.

The utilities further rely on the general statutory directive, also added by the Staggers Act, "to minimize the need for Federal regulatory control over the rail transportation system," by intervening to provide regulatory relief only when required. 49 U.S.C. 10101a(2). They argue that the prescription of local rates and requirement for competitive routings would minimize the need for future regulatory relief. Nevertheless, what the utilities propose, in the name of regulatory forbearance, is full regulatory intervention; they seek through regulation to deprive carriers of their statutorily-recognized long-haul and their traditional routing discretion. Thus, theirs is not a deregulatory initiative.

In summary, a shipper may not insist upon local rates for what is really a through service. If a shipper seeks a rate from an origin that is not currently served by the bottleneck carrier, either directly or in interline service, the carrier must accept the traffic at a reasonable interchange and establish a rate over the bottleneck segment to complete the transportation. A shipper seeking an alternative routing from an origin from which it is already served by the bottleneck carrier, either directly or in interline service, must proceed under the competitive access provisions of the statute. As set forth further in Part III, application of these principles requires us to dismiss, in whole or in part, each of the complaints before us.

II. -- General Application of the Governing Principles.

Having determined that a utility served by a bottleneck carrier may not force competition simply by seeking prescription of local rates over the bottleneck segment of its origin-to-

destination movement, we explore here whether the kind of relief the shippers seek is otherwise available. In this section, we address competitive access and rate reasonableness issues germane to that consideration.

Competitive Access Relief

As explained above, a utility served by a bottleneck carrier may not obtain an additional routing by the indirect means of seeking prescription of local rates over the bottleneck segment of its origin-to-destination movement. Rather, if it wants a routing that the bottleneck carrier is unwilling to provide, it must seek relief through the competitive access rules.

The competitive access rules were promulgated not to provide shippers with an alternative form of rate relief [Midtec, 857 F.2d at 1505-07; Intramodal Rail Competition--Proportional Rates, Ex Parte No. 445 (Sub-No. 2), slip op. at 2-4 (ICC served May 2, 1990)], but to offer a competitive remedy where a bottleneck carrier has exploited its market power by providing inadequate service over its own lines or foreclosing more efficient service over another carrier's lines. In evaluating such matters, we are attentive to the "classical categories of competitive abuse" that could produce such a result, including foreclosure, refusal to deal, or "other recognizable forms of monopolization or predation." Midtec, 3 I.C.C.2d at 173-74. We must also factor in the operational and service criteria of section 10705, including the comparative efficiency of routings, Midtec, 857 F.2d at 1503, and in doing so "take into account **all** relevant factors." 49 CFR 1144.5(a)(1) (emphasis added).

Although the competitive access rules were the product of shipper/carrier negotiation, we perceive a sense among the

shippers that, as construed in such cases as Baltimore Gas and Midtec, they stacked the deck against shippers ever obtaining "competitive access" relief. We disagree. Midtec and the other prior cases addressing competitive access all involved requests for reciprocal switching or terminal trackage rights, "access" remedies that are far more intrusive than the prescription of through routes.[16] Moreover, they involved the application of the rules to their unique facts.

We cannot declare in advance just what must be shown to make a competitive access case justifying the prescription of a new through route. No shipper has brought such a case to date, and relief would, of course, depend on the peculiar circumstances of each particular case. One vehicle for making such a case, however, would appear to be a transportation contract entered into for service over a non-bottleneck segment. We can foresee situations where contracts contain service terms providing benefits, advantages, and projected efficiencies that would make the proposed service over the non-bottleneck segment "better" than that presently offered by the bottleneck carrier over the existing through route, and make the bottleneck carrier's "foreclosure" of that service

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[16] See Vista Chem. Co. v. Atchison T. & S.F. Ry., 5 I.C.C.2d 331 (1989) (reciprocal switching); Shenango, Inc. v. Pittsburgh, C. & Y. Ry., 5 I.C.C.2d 995 (1989), aff'd sub nom. Shenango, Inc. v. ICC, 904 F.2d 696 (3d Cir. 1990) (terminal trackage rights). In rejecting the argument that Congress intended that we "prescribe reciprocal switching more freely than through routes," Midtec, 857 F.2d at 1500, the D.C. Circuit observed that:

> [i]f Congress intended any disparity in [the Board's] discretion to deny these remedies, . . . it would almost certainly have been by making reciprocal switching less rather than more available [than through routes].

Id. at 1501.

over an additional through route conduct that would warrant prescriptive relief. Assuming the shipper presents sufficient facts in that regard, there is nothing in our competitive access regulations to preclude a competitive access remedy, and we are prepared to interpret the rules in a manner that will provide for relief in appropriate circumstances.[17]

The previous access cases did not involve, and hence did not address, the role of contracts in the context of requests for the establishment of a through route. We note, however, that Congress in the Staggers Act broadly "encourag[ed]"

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[17] Relying upon Pennsylvania R.R. Co. v. Public Utilities Comm. of Ohio, 298 U.S. 170 (1936) (Ohio), some of the utilities argue that a competitive access remedy is not required when a shipper obtains a contract for the non-bottleneck segment, because exempt contract service over one route-segment and common carrier service over another cannot be combined to form a through route. Transcript of Oral Argument, October 31, 1996 (Transcript) at 116-17. We disagree. In Ohio, the Court held only that the ICC did not have jurisdiction over an intrastate rail movement that was preceded by an interstate movement provided in private carriage not subject to the ICC's jurisdiction. Ohio, however, does not extend to movements preceded by unregulated or exempt movements provided by a carrier. Cf. Central Freight Lines v. ICC, 899 F.2d 413 (5th Cir. 1990). Here, unlike Ohio, all of the services are provided cooperatively by rail carriers that are subject to the Board's jurisdiction, and the utilities thus cannot use Ohio to create the fiction that common carrier rail service following a rail contract movement "originates" at the interchange point, rather than the mine.

Moreover, while a contract entered into under section 10709 insulates the service under that contract from regulatory oversight, section 10709 does not override the routing and long-haul protections afforded under section 10705 to the non-contracting, connecting rail carrier for service over its route segment; section 10709 was not intended to impose new regulatory obligations on non-contracting parties. Thus, the fact that a contract may exist on one route segment of its preferred route would not relieve the shipper from having to make a case under the competitive access rules to obtain service over the other.

shippers and carriers to transact their rail transportation service by contract. H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 98-101 (1980). We also note that contracting provides a much better opportunity than common carriage for a rail carrier to address in detail a shipper's particular service needs, to provide service tailored to those requirements, and, as relevant here, to qualitatively distinguish such service from that offered elsewhere. Thus, although we do not suggest that shippers not entering into contracts will be shut out of the competitive access process, through the use of contracting, shippers seeking "through route access" may be able to establish underlying facts on comparative service inadequacies and/or efficiencies necessary to support such relief under the requirements of our rules.

The shippers' concerns over tying contracts to competitive access and other relief appears to be motivated, at least in part, by their perception that they will be unable to obtain contracts unless we force -- or at least strongly encourage through regulatory action -- the carriers to enter into contracts. In particular, at oral argument they asserted that the railroads' increasing concentration through recent mergers, and the defendant carriers' resistance to the requested relief in these complaint cases, is somehow evidence of a broader noncompetitive "mindset" in the railroad industry. This mindset, they claim, would preclude shippers from obtaining competitive contract offers from non-bottleneck carriers unless the Board first prescribed local rates over the bottleneck segment. Transcript at 29-30.

There is no basis on which to conclude that recent merger applications filed by particular railroads are indicative

of a non-competitive mindset in the industry.[18] To the contrary, recent decisions have found that competition has remained vigorous even where the number of competitors has been reduced from three to two as a result of a merger.[19] The fact that the railroad industry, through its positions in these complaint proceedings, has indicated a desire to maximize industry-wide profits has no bearing on whether individual railroads will compete with each other when asked by individual shippers to do so. To the contrary, in these proceedings, at least some non-bottleneck carriers have indicated their readiness to enter into contracts for the non-bottleneck portion of their service that the shippers claim they seek. Transcript at 208-09.

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[18] The argument that we should afford rate relief to mitigate the competitive harm caused by merger-related industry concentration is without merit. When we have approved mergers, we have done so because we found that the public benefits produced by the merger outweighed any associated competitive harm. Moreover, when we found potential competitive harm, we mitigated it through our conditioning power. In our view, recent merger activities have not produced, on an industrywide basis, competitive harm that needs to be mitigated through broad-based rate relief. Individual rate reasonableness challenges, of course, will continue to be available.

[19] Many objected to the Board's imposition, as a condition to the Union Pacific/Southern Pacific merger, of UPSP's trackage rights agreement with the Burlington Northern/Santa Fe (BNSF), on the ground that "duopoly" in the West would invariably lead to "market splitting and collusion" between the two major carriers. Union Pacific Corp.--Control and Merger--Southern Pacific Transp. Co., Finance Docket No. 32760 (Decision No. 44), slip op. at 116-18 (STB served Aug. 12, 1996). However, the pleadings filed by both carriers involving reconsideration and clarification of our merger decision suggest that BNSF and UPSP intend to vigorously compete for traffic affected by the trackage rights agreement.

In summary, when we address a shipper's request for a through route under the competitive access regulations -- involving contract or common carrier service -- we will consider a broad range of factors in examining what the rules characterize as "act[s]" that are "anticompetitive." For example, in our consideration, we will be mindful of the fact that contracting for rail transportation service was an important element in the scheme established by Congress in the Staggers Act for creating a more competitive, less regulated rail transportation system. The competitive access rules were designed to protect the railroads' freedom to rationalize their systems and maximize service over their most efficient routes, legitimate goals that both Congress and this Board clearly endorse. However, they were not designed to defeat legitimate competitive efforts by other rail carriers and shippers by permitting bottleneck carriers to foreclose more innovative, advantageous, and efficient service.[20]

Rate Reasonableness Review

Where through routes have been constructed by joint or proportional rates, shippers raising rate reasonableness issues under 49 U.S.C. 10701(a) have generally been required to challenge the entire rate over a through route, and have not been permitted to challenge a discrete segment. Underlying this requirement is the rationale that "[t]he shipper's only interest is that the charge shall be reasonable as a whole" (Great Northern, 294 U.S. at 463; see also L&N, 269 U.S. at 234; Met Ed, 5 I.C.C.2d at 400-10), and that, as a result,

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[20] We recognize that efforts by shippers to make a competitive access case using transportation contracts may raise issues of confidentiality and privilege, and we are prepared to craft procedures and orders necessary to address those concerns.

there is no basis for looking only at one component part of that charge.

The shippers concede that joint rates can only be reviewed as a whole, but they argue that existing precedent supports a separate reasonableness analysis for each of the components of a combination of proportional rates, regardless of whether service preceding or following that over the bottleneck segment is by common or contract carriage. The railroads, for their part, assert that under no circumstances can the reasonableness of a proportional rate established for a bottleneck segment be reviewed separately.[21] Neither

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[21] In addition to their legal argument based on their interpretation of ICC and court precedent, the railroads assert that separate rate reasonableness regulation of bottleneck segments would be bad policy because it would undermine the carriers' ability to differentially price their services (that is, to charge higher markups on their captive traffic). The railroads argue that differential pricing is necessary so that they can earn sufficient revenues to recover all of their joint and common costs and support reinvestment in, and replacement of, needed network facilities. See Coal Rate Guidelines, 1 I.C.C.2d at 526-28. They are concerned that a policy of separately capping the rate for the bottleneck segment of the through route at the stand-alone cost (SAC) level would produce, for the remaining (non-bottleneck) segment of the through route, a much lower, competitive rate level that could not return its share of those costs. As a result, the facilities for that traffic, absent sufficient revenues for reinvestment, would gradually disappear. Based on this scenario, the industry estimates that, if shippers were broadly permitted to obtain separate bottleneck segment-rate prescriptions, rail carriers would lose in excess of $2.4 billion in annual net revenue. AAR Comments, Verified Statement of Craig F. Rockey and John C. Klick, Tab 7. The utilities, on the other hand, assert that the revenue losses projected by AAR are overstated.

Although we do not expect our decision here to produce the types of revenue disruptions projected by the railroads, our decision does not turn on whose projections are more accurate. Our decision is, in our view, mandated by the law. Moreover, the revenue impact of our

position is legally valid.

For common carriage through traffic, the shippers' position would, in effect, defeat the through nature of a proportional rate. As the Great Northern Court stated, for that traffic, a "proportional [rate] cannot be applied save as it is part of the through rate." 294 U.S. at 463. As such, combined proportional rates are "more akin to [unitary] joint rates," properly challengeable only in their entirety. Met Ed, 5 I.C.C.2d at 403 n.22. For such rates, "[t]he shipper's only interest is that the charge shall be reasonable as a whole." Great Northern, 294 U.S. at 463; see also L&N, 269 U.S. at 233.

The shippers argue that Great Northern, and a prior Supreme Court decision on which it relied,[22] established a distinction between prescription of future rates and reparations for past rates. For reparations, they argue, Great Northern required a shipper to challenge the entire through rate. For prescription cases, they argue, Great Northern and Santa Fe permitted shippers to segment proportional rates in regulatory proceedings.

We disagree. Great Northern, which arose in the context of a reparations case, did not address the appropriate regulatory treatment of a prescription case. Moreover, Santa Fe did not hold that shippers could seek the prescription of a proportional rate alone. Rather, it involved a suit between **railroads** concerning a carrier's duty to establish a reasonable

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decision will depend on numerous imponderables concerning the way in which carriers and shippers compete for business.

[22] Atchison, T. & S.F. Ry. v. United States, 279 U.S. 768, 776 (1929) (Santa Fe).

rate on its portion of a through route so as not to foreclose that route for another carrier. The case did not address a **shipper's** challenge to the reasonableness of the proportional rate, but only the reasonableness of the rate as it might prejudice the route for a connecting carrier. 279 U.S. at 772-75. As a result, the Court did not suggest in either Great Northern or Santa Fe that, for purposes of a shipper's request for a rate prescription, we may consider the reasonableness of a proportional rate alone, without regard to the reasonableness of the total charges.

Accordingly, for traffic moving under a combination of common carriage proportional rates, we conclude that Great Northern has continuing "vitality." Met Ed, 5 I.C.C.2d at 408. Thus, a shipper's challenge to the reasonableness of a proportional rate covering a bottleneck segment that is combined with a common carriage rate over the non-bottleneck segment must, in our view, address the reasonableness of the entire through rate as a whole.

By contrast, when one of the components of service over the through route is embodied in a transportation contract, we cannot assess the reasonableness of the through rate in its entirety. While we are mindful of the railroad industry's need to differentially price its services, its substantial capital requirements, and our own duty in assisting rail carriers to earn adequate revenues, 49 U.S.C. 10101a(3), we must comply with other provisions of our governing statute. Specifically, 49 U.S.C. 10709(c)(1) (formerly 49 U.S.C. 10713(i)(1)) provides:

> A contract that is authorized by this section, and transportation under such contract, shall not be subject to [regulation], and may not be subsequently challenged before the Board or in

> any court on the grounds that such contract violates a provision of this part.

Plainly, we are without rate reasonableness jurisdiction over the rates of any rail transportation provided by contract. Regulation of the entire through rate -- even if the contract rate were simply treated as a given that cannot be changed -- would indirectly result in review of the contract rate, and Congress has declared the rates for that portion of the through-route service to be beyond our reasonableness jurisdiction. As a result, in a complaint against a bottleneck proportional rate that operates in combination with a contract rate, we conclude that, in light of section 10709(c)(1), we may consider **only** the reasonableness of the bottleneck rate.[23]

We are aware that the ICC concluded otherwise in Met Ed, a case involving contract service over one part of a through route, and that the Supreme Court in Great Northern required a reasonableness determination for the full through rate where part of the charge was a Canadian proportional rate outside of the ICC's jurisdiction. See, e.g., Comments of Consolidated Rail Corporation, October 15, 1996, at 24-26. Those cases are ultimately unavailing, however, given the clear statutory limitations on our authority over contract rates. We note that the Canadian rate involved in Great Northern was fundamentally different from a contract rate because it was a published tariff rate, not an amount contained in an undisclosed, confidential service contract. More significantly, Great Northern predated, and the ICC in Met Ed did not

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[23] Our analysis here is not inconsistent with our conclusions regarding competitive access. In competitive access cases, a contract may be used by the shipper to demonstrate that a connecting carrier should be required to provide competitive service; but the contract itself would not, in any sense, be subject to regulation. In a rate case, review of the through rate would indeed subject the contract to regulation.

squarely address, the jurisdiction-ousting language of 49 U.S.C. 10709(c)(1). In the Staggers Act, Congress made contracts "a separate class of rail service" that, once entered into, were thereafter "exempt (with certain limitations not relevant here) from all regulation and all of the requirements of the Interstate Commerce Act." H.R. Rep. No. 96-1430, 96th Cong., 2d Sess. 100 (1980). The language of section 10709(c)(1) reflects this clear intent and binds us here. Thus, where through-route service combines contract and proportional rates, a shipper may present a rate reasonableness challenge to the discrete bottleneck proportional rate, tested by the stand-alone cost for the bottleneck segment.[24]

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[24] We recognize that, in Ford Motor Co. v. ICC, 714 F.2d 1157 (D.C. Cir. 1983), the court determined that a rate reasonableness determination of the entire through rate could proceed notwithstanding the fact that one of the joint rate partners had, through a contract, settled the litigation as to itself. That case, however, like Met Ed, involved a joint rate into which both carriers had entered, and to which both carriers generally remained parties even after consummation of the rebate contract. It did not involve a situation in which the contracting railroad, although intending to be a party to through transportation, has entered into a separate rate contract from the outset. For that reason, and because the court in Ford, like the ICC in Met Ed, did not address the jurisdictional language of section 10709(c), neither Ford nor Met Ed changes our analysis.

Further, because the statute precludes us from considering the contract rate, we may not employ the so-called "intermediate" rate reasonableness approach on which we sought comments, under which we would permit the shipper to make a maximum rate reasonableness showing by adding the price of purchasing contract service over the non-bottleneck segment to the cost of constructing a stand-alone railroad over the bottleneck segment. See decision served August 27, 1996, at 8-9. We note that, in any event, in their comments and at oral argument, both the railroads and the shippers opposed the use of the intermediate approach under any circumstances.

III. -- The Cases at Issue.

CP&L Case

Docket No. 41242 concerns coal transportation to CP&L's power plant at Coleto Creek, TX, which is served by the Southern Pacific Transportation Company (SP). CP&L opened a new facility at Coleto Creek that would permit it to burn the lower sulfur-content coal from mines in Wyoming's Powder River Basin served by competing rail carriers, BN and Union Pacific (UP). To lower the delivered cost of its coal requirements at Coleto Creek, CP&L sought to obtain less expensive coal from those mines. CP&L asked SP for a trainload or unit-train coal rate for service between Coleto Creek and either the nearest interchange point with UP (at Victoria, TX) or with BN (at Fort Worth, TX), so that CP&L could separately contract with either UP or BN to provide long-haul service from the Powder River Basin. SP rejected the utility's request.

CP&L then challenged SP's single-car local class rate for traffic moving between Victoria and Coleto Creek,[25] so that it could ask the Board to prescribe a local unit-train or trainload rate over that bottleneck segment. Alternatively, CP&L asked the Board to prescribe a new through route with an interchange at Victoria and require SP to publish appropriate through rates for that route.[26]

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[25] CP&L had shipped one carload of coal under that rate in advance of filing its complaint.

[26] Even though only UP connects with SP at Victoria, the recently-approved merger of UP and SP would not, by itself, moot CP&L's complaint. Under the terms of our approval of the merger, BN would have the right to serve Victoria using the UP track. Union Pac. Corp. et al.--Control and Merger--Southern Pac. Rail Corp. et al., Finance Docket

SP moved to dismiss CP&L's complaint, arguing that CP&L cannot challenge the single-car local rate, and that it has not met the criteria of 49 U.S.C. 10705(a) for having a through route prescribed over Victoria. SP's "consistent position" is that it will provide through service for CP&L from the Powder River Basin to Coleto Creek over its more efficient route from Ft. Worth.[27] UP Reply Comments, October 25, 1996, at 8.

We will dismiss CP&L's complaint for the reasons provided in Part I. SP is not required to publish a local unit-train rate from Victoria to Coleto Creek (nor would it have been if CP&L had requested in its complaint a local rate from Ft. Worth to Coleto Creek), and we will not entertain its challenge to SP's single-car rate to produce that result. Further, CP&L did not submit evidence addressing comparative efficiencies and/or other factors needed to establish, under our competitive access regulations, its right to obtain from SP an alternative through route (and rates) for Powder River Basin coal traffic over Victoria, in addition to the through route SP is prepared to provide via Ft. Worth for that traffic. We will not entertain the request for local rates for what is a through service.

No. 32760 (Decision No. 44), slip op. at 63 (STB served Aug. 12, 1996).

[27] CP&L contracted with UP and SP jointly to transport 200,000 tons of Powder River Basin coal for "test-burn" purposes; that traffic moved in 17 trainloads to Coleto Creek via interchange at Ft. Worth during the fourth quarter 1995 and first quarter 1996. UP Reply Comments, October 25, 1996, Reply Verified Statement (RVS), Joseph T. Hutton at 3. The carrier states that it remains ready to establish through rates via Ft. Worth for additional CP&L coal traffic from the Powder River Basin.

PP&L Case

Docket No. 41295 concerns transportation to four PP&L generating stations served by Conrail. The coal burned at these plants currently comes from Pennsylvania mines also served by Conrail, and the carrier transports the coal to these facilities in single-line service under a transportation contract.

To meet the requirements of the Clean Air Act, PP&L desires to shift to low-sulfur coal from mines in West Virginia and Kentucky that are served by Norfolk Southern Corporation (NS) and CSX Transportation, Inc. (CSX). PP&L approached Conrail and asked it to establish local trainload or unit-train rates for coal shipments from the interchange point with CSX at Lurgan, PA, and from the interchange point with NS at Hagerstown, MD. Conrail denied that request.

PP&L then filed a complaint challenging as an unlawful and unreasonable practice Conrail's refusal to establish local volume rates from the interchange point, and also the reasonableness of Conrail's single-car local rates for service from Lurgan and Hagerstown to PP&L's four facilities.[28] Conrail answered that the single-car rates were not appropriate for PP&L's unit-train coal traffic and asked for an opportunity to establish appropriate unit-train rates. The ICC directed Conrail to do so, by decision served January 17, 1995.

In response to the ICC's order, Conrail established a joint rate with CSX for shipments through Lurgan, and a proportional rate for traffic interlined with NS at Hagerstown.

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[28] PP&L had sent various shipments of coal over those routes for test burns, but the parties dispute the nature of the rate that was charged for those shipments.

PP&L argues that Conrail was required by the ICC's order to establish a local rate for the bottleneck segment, and has filed a motion to enforce compliance with that alleged requirement. In addition, PP&L has amended its complaint to challenge the reasonableness of the new joint and proportional rates and has joined NS and CSX as defendants. The amended complaint continues to challenge the local single-car rates as well, and it asks for local trainload or unit-train rates to be prescribed from the Lurgan and Hagerstown interchange points to the four power plants.

Because it has filed joint rates with CSX, and proportional rates which can be used with NS rates, to complete the transportation to PP&L's generating plants of the coal from its new mine origins, Conrail argues that it need not file local rates for this service as well, and it has moved to dismiss PP&L's challenge to its single-car rates. The carrier also maintains that PP&L is not entitled to a separate rate reasonableness review of Conrail's portion of the through rates applicable to this traffic.

Unlike the CP&L case, PP&L does not involve a request for service over routes that the carrier does not offer; the parties agree that the Conrail routes via Lurgan and Hagerstown are appropriate, and that competitive access issues are not implicated here. E.g., Transcript at 128-29. Nonetheless, for the reasons provided in Part I, we shall dismiss PP&L's complaint against Conrail's single-car rate. By establishing joint and proportional rates for the involved service, Conrail has satisfied its common carrier obligation to complete PP&L's requested transportation from the new mine origins. As a result, Conrail is not required to publish a local unit-train or trainload rate for this through service, and we

will not entertain PP&L's challenge to Conrail's local single-car rate as a way for it to obtain that relief.[29]

PP&L's amended complaint may proceed against the reasonableness of Conrail's proportional and joint rates for the through service, and we shall shortly issue a procedural order in that regard. For the reasons provided in Part II, PP&L may not obtain a rate analysis confined to the bottleneck segment of the respective transportation, but must address the reasonableness of the entire common carriage through rates as a whole.

MidAmerican Case

Docket No. 41626 concerns transportation to MidAmerican's power plant at Sergeant Bluff, IA, which is served only by the UP. MidAmerican's traffic currently originates at a mine in the Powder River Basin served by both UP and BN (see UP Comments, October 15, 1996, at 16), but moves to the generating station in single-line service under a transportation contract with UP that will expire at the end of 1997.

When that contract ends, MidAmerican would like the opportunity to obtain competitive rail service from BN, which, like UP, provides service from several mines in the Powder River Basin from which the utility is likely to satisfy its future coal needs. MidAmerican Comments, October 15, 1996, at 11-12; Transcript at 149. Favoring its present single-line service from those mine origins, however, UP rejected MidAmerican's request to establish a local unit-train rate over UP's bottleneck segment from Council Bluffs, IA,

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[29] For the same reasons, we likewise deny PP&L's motion to require Conrail to establish local unit-train rates.

to its plant at Sergeant Bluff, which the utility could use in combination with separate service that it wished to obtain from BN from its selected mine origin to interchange.

MidAmerican then filed a complaint challenging UP's single-car local rate from Council Bluffs to Sergeant Bluff, so that it could ask the Board to prescribe a local unit-train rate over the bottleneck segment. UP moved to dismiss the complaint, on the grounds that it does not provide local service for Powder River Basin coal over its Council Bluffs-Sergeant Bluff line, and that it does not maintain, and cannot be required to maintain, a multi-carrier through route for unit-train movements between Powder River Basin mine origins and the Sergeant Bluffs generating station that it can serve single-line.

We will dismiss MidAmerican's complaint for the reasons provided in Part I. UP is not required to publish a local unit-train rate from Council Bluffs to Sergeant Bluff, and we will not entertain its challenge to UP's single-car rate designed to produce that result. We would have to dismiss MidAmerican's complaint on ripeness grounds in any event. As noted, the utility's coal currently moves under a transportation contract that does not expire until December 31, 1997. Under Burlington N. R.R. v. Surface Transp. Bd., 75 F.3d 685, 692-96 (D.C. Cir. 1996), the Board is without authority to adjudicate a rate case involving a common carrier rate that might be used upon the expiration of a contract until at or near the time at which the contract expires.[30]

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[30] At the oral argument, representatives of both railroads and shippers indicated their intent to address, through private sector discussions, the precise time at which a shipper should be permitted to file a complaint seeking a rate prescription for service currently subject to contract. We expect the parties to follow through on their representations.

MISCELLANEOUS

On November 27, 1996, the National Industrial Transportation League and WCTL filed a motion for leave to file a verified statement of Dr. Alfred E. Kahn. On December 16, 1996, AAR opposed the motion, arguing that Dr. Kahn's statement is really a time-barred reply. AAR requests that, should the Board elect to accept Dr. Kahn's statement, it also accept AAR's attached reply statement of Professors Baumol and Willig. To ensure as complete a record as possible, we will accept both statements into the record.

It is ordered:

1. The motions to dismiss the complaints in Nos. 41242 and 41626 are granted, and the proceedings are discontinued.

2. The motion to dismiss the amended complaint in No. 41295 is granted only as to the reasonableness of Conrail's local single-car rates, and whether it was an unreasonable practice for Conrail to refuse to establish local rates. In all other respects, the amended complaint may proceed, and the Secretary will publish separately a procedural schedule in that proceeding.

3. The motion for leave to file the verified statement of Dr. Alfred E. Kahn is granted; AAR's reply statement is also accepted for filing.

4. This decision will be effective on January 30, 1997.

By the Board, Chairman Morgan, Vice Chairman Simmons, and Commissioner Owen. Commissioner Owen commented with a separate expression.

Vernon A. Williams
Secretary

Commissioner Owen, *commenting*: It is unfortunate that parties to this proceeding are unwilling to reach negotiated settlements on these issues.

More unfortunate is that such reliance on government to solve private-sector problems encourages a cycle of dependence that weakens further the parties' negotiating resolve and encourages a return to third-party intervention that, as history records, was equally detrimental to both railroads and their customers.

Indeed, without a negotiated settlement among the parties this issue likely is headed for the lap of Congress where solutions too often are hastily drawn, politically motivated and for a long-time afterward insulated from change even by private agreement of the parties who had the dispute.

Whatever the eventual outcome, the fact remains that the parties have knocked loudly upon our door, ignored subsequent admonitions to settle these matters privately among themselves and continued to beg for government intervention.

Neither party should -- or, I suspect, will -- consider this decision a victory. With regard to open access, it certainly should **not** be viewed as a precedent that may be

followed in other proceedings coming before this Board. For while I concur that shippers have failed -- in this proceeding -- to make a case for forceful elimination of bottlenecks, I am not at all convinced that it is in the long-term interest of shippers, railroads or this nation that bottlenecks and the anticompetitive behavior they can encourage be perpetuated.

With regard to this proceeding, I remind shippers of those days before the 4-R Act when it was possible for every shipper to second guess seasoned railroad officials in determining the routing for every carload of freight. Literally thousands of routes were available between most origins and destinations. In the extreme, a carload of freight could be routed from Dallas to Detroit by way of Los Angeles, requiring the inefficient participation of multiple railroads, unnecessary labor and the waste of productive capacity.

Although those seeking relief in this proceeding certainly are not yearning for a return to such inefficiencies, our acquiescence would place all shippers, all commodities and all railroads on a very slippery slope in that direction.

No wonder the community of shippers is far from united on this issue. In fact, many shippers have expressed strong and reasoned arguments why this Board should not grant the special-interest relief sought.

This is not a dispute between small businesses and large railroads, but one between equally large and powerful corporations. What we are being asked to do is to transfer wealth by force from one great corporate entity to another without a showing that the *status quo* is causing electricity rates to be higher than they otherwise would be and without a showing that there are inherent inefficiencies in the *status quo*.

To the extent railroads do exploit their market power and provide inadequate service or foreclose more efficient service over a competitor's track, then the door is open and I shall be sympathetic. Shippers have yet to make efficiency arguments. What I hear is a demand for government to be a battering ram in order that shippers achieve even lower prices.

I must add that I might have supported a somewhat different outcome -- and might well be supportive of open access -- if it were determined that railroads no longer are to receive "special" assistance to achieve revenue adequacy. Congress, of course, has instructed this Board to assist railroads in achieving revenue adequacy.

Although I doubt that railroads remain revenue inadequate -- one need only read railroad annual reports or consult the research summaries of Standard & Poor's to raise such a doubt -- this Board's unchallenged decisions assert that most railroads remain revenue inadequate. And so long as that is so, the forceful opening of bottlenecks will drive all rail rates toward marginal costs with the result of adversely impacting all-important service levels and encouraging a flight of capital from the railroad industry.

I am compelled to comment also upon the notion of some shippers that mergers are creating a market concentration that will impede their ability to obtain competitive contracts with railroads.

In response I emphasize that "more" is not necessarily "better". As the Interstate Commerce Commission remarked in its 14th annual report in 1911, "no competition is so destructive as that between railways." Since 1920 it has been the public policy, as enunciated by Congress, to reduce the

number of competing railroad systems. The reason is straightforward: To concentrate dwindling freight and passenger business on fewer tracks, permit elimination of redundant routes, signals, yards and terminals, reduce track maintenance, improve equipment utilization, and centralize management of marketing, sales, pricing, advertising and accounting.

The economic benefits of fewer railroads, coupled with deregulation, have been enormous and largely shared with railroad customers. Indeed, shippers do not challenge the existence or sharing of the savings, but complain that they want an even bigger share.

The plain-dealing fact is that there is a market cost to competition -- the cost of finding competitive alternatives. I am given to understand, for example, that only 55 percent of this nation's electricity is generated by coal, and only about 57 percent of that coal is carried by rail.[1] Additionally, electric utilities have gained new ability to "wheel" wholesale power.

I continue to believe that more efficient solutions to all shipper-carrier disputes are to be achieved in the marketplace and through direct negotiations without the intrusion of government. Perhaps my admonition in favor of negotiation should include this paraphrase from Isaiah 1:18-20: "Come let us reason together, or ye shall be devoured by the sword."

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[1] Of the 3 trillion kilowatt hours of electricity generated in 1994, 55 percent was provided by coal, 20 percent by nuclear power, 11 percent by natural gas, 9 percent by hydropower and 2 percent by "other" means. "Choices in a Competitive Economy," Center for Energy and Economic Development, April 1995; and "Destination of U.S. Coal by Origin, Destination and Method of Transportation," U.S. Department of Energy, 1996.

Since the day I joined this Board I have been preaching to railroads, shippers and unions that we must strive even harder to reduce our dependence upon government. I do so again.

APPENDIX C

C-1

SERVICE DATE - LATE RELEASE APRIL 30, 1997

This decision will be published in the bound version of printed reports at a later date.

SURFACE TRANSPORTATION BOARD[1]

No. 41242

CENTRAL POWER & LIGHT COMPANY
v.
SOUTHERN PACIFIC TRANSPORTATION COMPANY

No. 41295

PENNSYLVANIA POWER & LIGHT COMPANY
v.
CONSOLIDATED RAIL CORPORATION

No. 41626

MIDAMERICAN ENERGY COMPANY
v.
UNION PACIFIC RAILROAD COMPANY

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[1] The ICC Termination Act of 1995, Pub. L. No. 104-88, 109 Stat. 803 (1995) (the ICCTA), abolished the Interstate Commerce Commission (ICC) and transferred certain functions to the Surface Transportation Board (Board), effective January 1, 1996. Section 204(b)(1) of the ICCTA provides, in general, that proceedings pending before the ICC on the effective date of that legislation shall be decided under the law in effect prior to January 1, 1996, insofar as they involve functions retained by the ICCTA. The captioned proceedings were pending with the ICC prior to January 1, 1996, and concern functions which are now under this Board's jurisdiction. Accordingly, references in this decision are to the old law (West Ed. 1995) unless otherwise indicated.

C-2

and
CHICAGO AND NORTH WESTERN RAILWAY COMPANY

Decided: April 28, 1997

The Board grants, in part, a petition for clarification of its previous decision, and denies a petition for reconsideration.

DECISION

BY THE BOARD:

By decision served in these proceedings on December 31, 1996 (Bottleneck), we granted motions to dismiss, in whole or in part, the complaints of the above-named electric utilities seeking the prescription of certain rates for the unit-train or trainload transportation of coal. In each case, the utility's generating station is served by only one rail carrier over a "bottleneck" segment, a segment for which no alternative rail route is available. Central Power & Light Company (CP&L) and Pennsylvania Power & Light Company (PP&L) seek coal from sources that the bottleneck carriers in their respective cases cannot serve directly; instead, those carriers can only deliver the coal to the generating station after receiving it at a point along the bottleneck segment from the railroad originating the transportation. MidAmerican Energy Company (MidAmerican), in contrast, obtains its coal from sources that are served directly by the bottleneck carrier. Instead of continuing with that carrier's single-line service, however, MidAmerican wants to use another railroad that serves its sources to pick up the coal and interchange it with the bottleneck carrier for delivery at a point close to the generating station.

While origin-to-destination service requiring more than one rail carrier typically moves under joint or proportional rates, each utility, through its complaint, sought to break its desired multi-carrier coal transportation into separate components by first having the Board prescribe a unit-train or trainload "local" rate over the bottleneck segment from an interchange point of the shipper's choosing relatively close to the generating station. Once they had a bottleneck-segment rate in hand, the utilities then planned to obtain from the origin "non-bottleneck" carrier a separate, unrelated rate for service from the mine to the interchange point, likely under an unregulated shipper-carrier rail transportation contract. The utilities claimed that the railroads' obligations to transport traffic upon request, and to interchange traffic with other railroads if necessary to complete the transportation, entitled the shippers to obtain local service (and separately challengeable local rates) from each carrier that participates in their coal shipments.[2]

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[2] The utilities sought to avoid joint and proportional through rates because a shipper may challenge the reasonableness of those rates only in their entirety, not simply the portion of the rates attributable to the bottleneck segment of the through movement. Louisville & N.R.R. v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 231-34 (1925) (L&N); Great Northern Ry. v. Sullivan, 294 U.S. 458, 462-63 (1935) (Great Northern); see also, Western Resources, Inc. v. STB, No. 95-1435, slip op. at 13 (D.C. Cir. Mar. 28, 1997). Pursuing local service, the utilities apparently concluded, would enable them to obtain a discrete Board rate reasonableness analysis and rate prescription for each relatively short bottleneck segment, measured by the stand-alone costs (SAC) of providing service over that segment, rather than the SAC over the entire through route as would be required if joint or proportional rates were being charged. A "local-rate" prescription would also, they apparently concluded, free them in turn to secure separate and competitively priced contract rates for the non-bottleneck portion of their transportation, which would produce lower freight rates overall. The shippers claim that, absent a local-rate prescription for the bottleneck segment, they will be

(continued...)

The bottleneck carriers in each case moved to dismiss the complaints on the ground that they could not be forced to artificially sever what is clearly "through" traffic and provide separately priced "local" service over the bottleneck segments. The bottleneck carriers in CP&L and MidAmerican also argued that, because they now provide either single-line service (MidAmerican) or have designated an interchange point for interline service (CP&L) for the utilities' respective coal traffic, they are not required to "open" another route via a different interchange simply on the utility's request, particularly where that would force them to accept a shorter haul over their own lines than they otherwise would enjoy.[3]

Because the three complaints raised common issues that would likely affect, on an industrywide basis, the way in which railroad rates are set and challenged in the future, we concluded that the efficient way to deal with all three would be to combine them for handling, seek public comment, and hold oral argument. Having considered the pleadings in the individual cases, the more recent written comments, and testimony by the parties and other members of the public at the October 31, 1996 oral argument, we issued the Bottleneck decision, in which we resolved the issues raised, applied our determination to the complaints before us, and provided guidance for future cases.

In our decision, we reviewed both the types of service that shippers may demand and the types of rate challenges that they may bring. We held that a shipper may not insist that a

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[2](...continued)
unable to obtain contracts over the non-bottleneck segments.

[3] Although it too sought local service over a bottleneck segment, unlike CP&L and MidAmerican, PP&L did not seek a route that was different from that which the bottleneck carrier stood ready to provide.

bottleneck carrier provide only short-haul service under separately challengeable local rates if the carrier also provides, alone or in conjunction with other carriers, origin-to-destination service. We found that, under current law, so long as the bottleneck carrier provides the origin-to-destination service that the shipper seeks -- by single-line rates or through rates with other carriers (generally joint or proportional rates) -- it is not required to additionally hold out local rates for transportation that clearly is not local to the bottleneck segment. We concluded that giving shippers the rate control that they sought would not withstand legal scrutiny, as it would defeat a railroad's right to determine, at the outset, the rates that it will use to respond to requests for through service. Bottleneck at 5-6, citing 49 U.S.C. 10701a(a) (now 49 U.S.C. 10701(c)).

We further held that a shipper is not entitled, upon request, to an alternative routing from an origin from which it is now served by a bottleneck carrier, either directly or in interline service. That, we found, would defeat the carrier's initial discretion to choose its routes and protect its long-hauls. Instead, we determined, if a shipper wants a route other than the one currently provided by the bottleneck carrier, it must invoke our "competitive access" regulations and demonstrate that the bottleneck carrier's refusal to establish such a route would foreclose more efficient service. We concluded that, while a shipper-carrier contract for service over the non-bottleneck segment of its desired route could be useful as a factor in a competitive access case, it would not by itself relieve the shipper of its obligation to satisfy the competitive access regulations to obtain an alternative route. Bottleneck at 6-8, 8-11, citing 49 U.S.C. 10705(a)(1), (a)(2); 49 CFR 1144.5.

At the same time, we reaffirmed that a railroad's common carrier obligation requires it to provide rates and routes to move traffic from any origin to any destination, and that a carrier therefore could not refuse a shipper's request for service from a new origin. Thus, we found, if a shipper seeks service from an origin that is not currently served by a bottleneck carrier, either directly or in interline service, that carrier cannot refuse service, but instead must accept the traffic from the origin carrier at a reasonable interchange point and provide a rate to complete the transportation. Bottleneck at 4-5, citing 49 U.S.C. 11101(a), 10742.

Lastly, we addressed how we would examine rate reasonableness issues in cases involving bottleneck carriers. We reaffirmed the principles of L&N and Great Northern that, when railroads establish common carriage through rates, shippers must challenge the reasonableness of the entire rate from origin to destination, and may not challenge the bottleneck segment separately. When, however, the rate for the non-bottleneck segment has been separately set through a shipper-carrier rail transportation contract, we found that we could not address the reasonableness of the entire origin-to-destination rate without exercising regulatory authority over the contract. Because we lack jurisdiction to regulate railroad-shipper contracts, we concluded that, under such circumstances, we must assess the reasonableness of the rates over the bottleneck segment alone. Bottleneck at 11-14, citing 49 U.S.C. 10709(c)(1) (formerly 49 U.S.C. 10713(i)(1)).

Applying these principles to the three complaints before us, we dismissed CP&L and MidAmerican, and in part PP&L, on the common ground that the utilities could not insist that the bottleneck carriers establish local rates for what

is really a through service. Bottleneck at 4-8, 14-17.[4] In the face of the discretion afforded railroads initially to select their rates and routes and to protect their long-hauls, we determined that the law simply does not provide these utilities the right, upon request, to segmented origin-to-destination service in the manner sought in these cases. Id. at 4-8.[5] We found that, although we are directed to permit -- indeed, even encourage -- competition, the shippers' approach would go further and artificially force competition by impermissibly depriving the bottleneck carriers of their initial rate and route discretion. Id. at 8.

On January 21, 1997, MidAmerican filed a petition for clarification of our December 31st decision, and Western Resources, Inc. (WRI) filed a petition for reconsideration. We address these petitions in turn.

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[4] To the extent that PP&L's amended complaint also involved a challenge to the reasonableness of the joint and proportional rates established for the origin-to-destination service, we permitted that portion of the complaint to proceed. Bottleneck at 16-17.

[5] In CP&L, we determined that the utility also did not establish, under our competitive access regulations, its right to an alternative through route for its Powder River Basin coal traffic via Victoria, TX, in addition to the through route via Ft. Worth, TX, that Southern Pacific (SP), the involved bottleneck carrier, was prepared to provide for that coal traffic. Bottleneck at 15. Further, because MidAmerican's present rail transportation contract with Union Pacific (UP) will not expire until December 31, 1997, we determined that its complaint had to be dismissed on ripeness grounds as well. Id. at 17, citing Burlington N. R.R. v. Surface Transp. Bd., 75 F.3d 685, 692-96 (D.C. Cir. 1996) (Board may not prematurely require a common carrier rate be established for post-contract shipments).

PETITION FOR CLARIFICATION

MidAmerican, supported by the Western Coal Traffic League (WCTL), asks us to clarify the December 31st decision by explaining more fully the availability of bottleneck-segment rate relief where, unlike the circumstances in the dismissed complaints, a shipper has first secured a separate rate for service over a non-bottleneck segment through a shipper-carrier rail transportation contract. Bottleneck at 13-14. The Association of American Railroads (AAR) opposes this request, arguing that such a determination should be made in actual cases, not through the hypothetical examples presented in MidAmerican's petition. AAR also argues that the clarifications sought by the utility, if granted, would effectively and improperly compel what we found that railroads were not required to provide -- segment rates for through service.

We share AAR's concern that, because any particular bottleneck rate case is likely to be distinct, the Board should not prejudge a railroad's rate and routing obligations or predetermine remedies in every conceivable set of circumstances, and we will not do so here.[6] AAR Opposition at 6, 8. However, recognizing the impact our decision would likely have on future bottleneck-rate complaints, we have sought public comment and conducted oral argument to air thoroughly the common legal and policy issues involved in these matters so that we could set forth, as completely as possible, our approach to these cases. To that end, MidAmerican's petition raises questions that we conclude should not await future cases, but instead should be addressed now.

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[6] We do, however, draw on the specific facts of the three complaints before us to help illustrate and explain our decision here. See notes 13 and 14, infra.

Accordingly, we grant the petition and clarify our December 31st decision to the extent set forth below. We address MidAmerican's questions in two different settings: (1) those situations where the bottleneck carrier serves both the origin and destination at issue and provides single-line service; and (2) those situations where the bottleneck carrier does not serve the origin at issue, but can deliver traffic to destination only after interchanging it with another carrier.[7]

Alternative Service From Origin Now Served By Bottleneck Carrier

In the first situation, the shipper seeks to forgo the bottleneck carrier's single-line service by separately contracting with a second rail carrier that also serves the origin for transportation to an interchange point on the bottleneck segment. If the shipper already has a contract with the second carrier in hand, MidAmerican asks whether the bottleneck carrier would then be required to establish, upon the shipper's request, a rate from that interchange point to destination that would operate in combination with the contract to complete the transportation, and whether we would separately adjudicate the reasonableness of that rate if separately challenged on rate reasonableness grounds. Clf. Pet. at 4-6.

In this situation, our prior decision is clear. As we stated there, where a bottleneck carrier already serves the origin, either directly or in interline service, it need not provide, on request, an additional rate for transportation over the bottleneck segment of an alternative interline route from that origin. Instead, the shipper must first proceed under our

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[7] Our analysis has equal relevance if the bottleneck exists on the origin, rather than the destination, segment. Clarification Petition (Clf. Pet.) at 4 n.2.

competitive access regulations to obtain an order requiring the opening of that route. Bottleneck at 6-11; 49 CFR 1144.5. We stated that, where it is shown, pursuant to the rules, that a carrier's refusal to establish an alternative through route would foreclose more efficient service, we will prescribe that route. We also explained that a contract obtained for service over a non-bottleneck segment of the shipper's preferred route may be useful in making a successful access case. Id. at 9-11.

We determined, however, that a shipper-carrier contract entered into under 49 U.S.C. 10709 for rail service over the non-bottleneck segment, though itself insulated from further regulatory oversight, would not relieve the shipper from having to make an access case, because the contract:

> does not override the routing and long-haul protections afforded under section 10705 to the non-contracting, connecting rail carrier for service over its route segment; section 10709 was not intended to impose new regulatory obligations on non-contracting parties.

Bottleneck at 9-10 n.17. The routing protections provided to rail carriers by section 10705 are longstanding and, as we explained, confer on each railroad the initial discretion to choose the routes it will use to respond to requests for service. Id. at 6. In particular, the right of a rail carrier not to be short-hauled, 49 U.S.C. 10705(a)(2), originated in the Mann-Elkins Act of 1910, Pub. L. No. 218, 36 Stat. 539, 552 (1910), and protects a railroad, at the outset, from the precise result posed by MidAmerican's hypothetical: "hav[ing] to carry over its lines traffic originating on, or destined to, another line when the entire carriage could as well have taken place on its own line." Chicago, M., S.P. & P. R.R. v. United States, 366 U.S. 745, 750-51, 757 (1961). Because

the competitive access regulations can override the application of the protections afforded by section 10705, we found that they must be satisfied before a shipper can gain an additional route that a rail carrier, pursuant to that provision, is not willing and, at the outset, not required to provide. Id. at 6-8.[8]

MidAmerican asserts, but without elaboration, that if a bottleneck carrier is not required to respond immediately to a request for separate bottleneck-segment service in these circumstances, Western coal shippers will be largely unable to obtain a separately challengeable bottleneck-segment rate over an alternative interline route for Powder River Basin coal shipments moving from mines that are served both by UP and Burlington Northern (BN). Clf. Pet. at 6 n.5. What MidAmerican seems to suggest, however, is that it is unwilling to test the competitive access regulations to attempt to gain the Board's prescription of an alternative through route that might yield that result. For the reasons stated in our December 31st decision and restated here, under the current statute it must pursue recourse under the competitive access regulations.

Service From Origin Not Served By Bottleneck Carrier

In contrast, we found in our December 31st decision that, for traffic from an origin **not** currently served by the bottleneck carrier, either directly or in interline service, but destined to a point on its line, the carrier cannot refuse a shipper's request for service. Instead, the bottleneck carrier must interchange this traffic with the origin carrier and

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[8] That there may be more than one point along the bottleneck segment for traffic to be interchanged would not change this result. Clf. Pet. at 9 (first diagram). Where a bottleneck carrier serves the origin, the shipper must invoke the competitive access rules to obtain an alternative interline routing over any particular interchange that it may designate.

provide a route and rate to complete the transportation. Bottleneck at 4-5. Where, in that situation, a shipper first contracts with the origin railroad to carry this "new-origin" traffic to an interchange point on the bottleneck segment, MidAmerican asks which of three results would prevail: (1) must the bottleneck carrier provide, upon request, a separately challengeable rate from that interchange point to destination that would operate in combination with the contract to complete the transportation; (2) can the bottleneck carrier refuse to establish such a rate by insisting on an interchange point different from the one selected in the contract, Clf. Pet. at 9 (second diagram); or (3) can the bottleneck carrier refuse to establish such a rate, even where there is agreement on the interchange, by offering only joint rate service? Clf. Pet. at 7-8.

We clarify our December 31st decision to explain in more detail the bottleneck carrier's rights and obligations to interchange in these circumstances, and to outline our approach for resolving interchange disputes, like that posed in MidAmerican's hypothetical, which may arise in subsequent bottleneck rate cases.[9] Unlike the situation where the bottleneck carrier serves the origin, for service from an origin that it does not serve, the bottleneck carrier's initial routing

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[9] Historically, interchange cases under section 10742 (and former section 3(4), its statutory predecessor) have mainly concerned discrimination issues between carriers; i.e., whether, under section 10742, a rail carrier has failed to provide a complaining rail carrier with interchange facilities "equal" to those offered to other railroads. See e.g., Pennsylvania Ry. v. United States, 236 U.S. 351, 371-72 (1915); Burlington N. R.R. v. United States, 731 F.2d 33, 36-38 (D.C. Cir. 1984) (BNRR). In that regard, the cases are of little help in resolving interchange disputes in bottleneck rate cases which do not raise those issues, but instead involve routing and rate issues between bottleneck carriers and shippers. Thus, the interchange issue posed here is, in a significant sense, one of first impression.

discretion, including its right to maximize its long-haul -- United States v. Missouri Pac. R.R., 278 U.S. 269, 276-82 (1929), Pennsylvania R.R. v. United States, 323 U.S. 588, 591-92 (1945) -- is no greater than that of the origin carrier that must also participate in the transportation. As a result, the choice of an interchange for the required two-carrier service in these circumstances cannot be dictated unilaterally by either the bottleneck carrier or, through its contract with the shipper, the origin carrier. Instead, under 49 U.S.C. 10742, the determination of an interchange point for the required through movement is, in the first instance, "a matter of mutual consultation and agreement" between the two carriers. New York, C. & St. L. R.R. v. New York Cent. R.R., 317 I.C.C. 344, 346 (1961); see also, e.g., Black v. ICC, 837 F.2d 1175, 1178 (D.C. Cir. 1988) (Black); Southern Ry.-Control-Central of Georgia Ry., 317 I.C.C. 557, 583 (1962).[10]

Under their common carrier and interchange obligations, however, the origin and bottleneck carrier together must provide at least **one** route to complete the shipper's needed multi-carrier service from the desired origin point. Bottleneck at 4-5; 49 U.S.C. 11101(a), 10742; see also 49 U.S.C. 10703. Accordingly, if the carriers cannot agree on an interchange that would act to create that route, we will

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[10] The fact that, in a connecting carrier discrimination case, a delivering bottleneck carrier need only offer, among potential interchange points with "equal" facilities, that "option which best serves its own business interests," BNRR, 731 F.2d at 40, would not, in the circumstances posed by MidAmerican, change the "mutual-agreement" requirement or otherwise permit the bottleneck carrier to dictate its chosen interchange point where the origin carrier, with equal routing rights, has selected a different point.

determine one.[11] That determination would not involve the competitive access regulations. As we explained in our December 31st decision, the competitive access rules provide an avenue for remedies for situations where a carrier has exploited its market power to perpetuate its own inadequate service or to foreclose more efficient service offered by another rail carrier. Bottleneck at 8-9. By determining an interchange for service from an origin that the bottleneck carrier does not serve, we would not be adding a competitive alternative, but merely resolving the carriers' disagreement as to the route over which the carriers would be required to provide service.

In those circumstances, our determination of an interchange, absent an agreement between the carriers, would not be governed by the competitive access rules, but rather by a variety of other factors, including a comparison of the physical and operational feasibility of interchange at the points selected by the carriers.[12] The shipper-carrier contract for service over the non-bottleneck segment, while not conclusive by itself, could also be useful as a factor in our determination of an interchange point (compare Bottleneck at 9-11, in which

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[11] See United States v. Pennsylvania R.R., 323 U.S. 612, 619 (1945) (the regulatory authority to require railroads to interchange derived originally from the authority to prescribe through routes).

[12] See, e.g., Black, 731 F.2d at 1177-78, aff'g Indiana R.R.-Exempt.-Acq. & Oper., Finance Docket No. 30789, 1987 ICC LEXIS 370, at * 3-5 (ICC Apr. 7, 1987). We would point out, however, that while the competitive access rules are not applicable in these circumstances, evidence comparable to what would be provided under any of the competitive access criteria would not be precluded. For example, evidence comparing the efficiency of the entire origin-to-destination service using each of the chosen interchange points, a required consideration in an access case (49 CFR 1144.5(a)(1)(B)), could also be probative in an interchange determination.

we discussed the role of contracts in competitive access cases).

Once an interchange point establishing the required route has been mutually agreed to by the participating carriers (or, if necessary, determined by the Board), where a shipper has a contract with the origin carrier for service to that interchange point, the bottleneck carrier cannot refuse to complete the transportation from that point simply because it cannot enter into a preferred joint rate with the origin carrier. Clf. Pet. at 8. Rather, it must provide whatever rate is necessary to complete the transportation over the route the carriers established for the traffic, and to the extent that we need to clarify our December 31st decision to reinforce that intended determination, we do so here.

This outcome must occur because any tension between a bottleneck carrier's discretion to determine the kind of rates it will use (joint, proportional, or local, see 49 U.S.C. 10701a (now 49 U.S.C. 10701(c)), and its obligation as a carrier to provide service, see 49 U.S.C. 11101(a), must be resolved here in favor of service. Unlike the situation where the bottleneck carrier serves the origin, when service is required from an origin it does not serve, the bottleneck carrier's discretion to determine the kind of rates that it will offer is not absolute, but must necessarily be accommodated with that equally held and exercised by the origin carrier. In MidAmerican's hypothetical, the origin carrier, through its contract with the shipper to provide service over the non-bottleneck segment, has necessarily declined to enter into a unitary, joint-rate arrangement with the bottleneck carrier, and that choice must be accommodated with the bottleneck carrier's own preferences.

In those circumstances, the bottleneck carrier cannot insist on only providing joint-rate service and, as a result, refuse service when it is unable to make those rates; instead, its common carrier obligation requires it to provide a rate necessary to complete the transportation.[13] As we determined in our December 31st decision, because we lack jurisdiction to review the reasonableness of the terms associated with the portion of the movement covered by the contract, the rate provided by the bottleneck carrier in these circumstances (likely a proportional rate) would be separately challengeable on rate reasonableness grounds. Bottleneck at 13-14.[14]

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[13] This result would stand in contrast to the three complaints considered in our December 31st decision. By requesting in those cases that the Board first prescribe local rates over the bottleneck segment, prior to any determination by the origin carrier of the service it would provide over its lines, the utilities would deprive the bottleneck carrier, from the outset, of any discretion to explore with the origin carrier the possibilities of providing joint or proportional through rates for the involved through traffic. That result, we explained, could not be sustained in the face of statutory provisions protecting a railroad's initial rate and routing discretion. In contrast, where a shipper has first obtained a separate contract with the origin carrier for service over the non-bottleneck segment, the origin carrier has acted and chosen not to enter into a joint rate arrangement with the bottleneck carrier, thus necessarily circumscribing the latter's rate discretion.

[14] To illustrate further, in the CP&L case, SP held out through rail service via Ft. Worth (as opposed to Victoria) for CP&L coal traffic destined to Coleto Creek from the Powder River Basin, an origin not served by SP. Bottleneck at 15; UP Reply Comments, October 25, 1996, at 8. If, **unlike** the facts of its complaint, CP&L had first separately contracted with UP or BN for service from the Powder River Basin to Ft. Worth, then, under our December 31st decision, SP could not have refused service from Ft. Worth to Coleto Creek on the ground that it offered only joint-rate service for this traffic. Rather, under our decision, SP's initial discretion to determine its rates would have had to yield to its obligation to provide service to Coleto Creek over its provided route, requiring it to depart from its "general" policy of offering only joint rates

(continued...)

Suggesting that this may not be the only or proper remedy, AAR asserts that we could prescribe, under 49 U.S.C. 10705(a)(1), a joint rate with an appropriate division for the bottleneck carrier. AAR Opposition at 8. We foresee little likelihood, however, of granting that kind of relief in bottleneck rate cases. In our December 31st decision, we noted our responsibility to facilitate competition, but observed that the utilities' request for "local" bottleneck-segment rates, by precluding the bottleneck carriers from pursuing any cooperative rate and routing possibilities with the origin carriers, would work to impermissibly force competition. Bottleneck at 8. AAR's suggested joint rate/division remedy, where a shipper has first obtained a contract from the origin carrier for service over the non-bottleneck segment, would just as impermissibly allow the bottleneck carriers to avoid competition.

PETITION FOR RECONSIDERATION

WRI, supported by WCTL, asks us to reconsider our December 31st decision.[15] WRI alleges that we wrongly

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[14](...continued)
(UP Reply at 8 n.9), and to provide a proportional rate or other rate from Ft. Worth that would operate in combination with the contract to complete the transportation. We would have required the same from Conrail in the PP&L case if PP&L had entered into a contract with Norfolk Southern (NS) for service to the interchange established at Hagerstown, MD, or if PP&L had contracted with CSX Transportation, Inc. (CSX) for service to the interchange established at Lurgan, PA. Had those events occurred, any common carriage rates provided by SP or Conrail to complete the transportation over the respective bottleneck segments would have been, under our December 31st decision, separately challengeable on rate reasonableness grounds.

[15] WRI states that the affidavit and exhibits upon which its petition is based are confidential and, as a result, asks that they not be made part of (continued...)

presumed that non-bottleneck carriers would, on request, offer contracts over the non-bottleneck segment of a through movement without our prior prescription of a bottleneck-segment rate. Pointing to evidence allegedly showing that UP, the non-bottleneck rail carrier for the origin segment of WRI's desired coal traffic, refused to enter into a service contract for that segment for the utility's account, WRI, a Kansas electric utility, argues that non-bottleneck railroads in fact will not contract. As a result, WRI asks that we not make bottleneck-segment relief contingent on the "illusory" condition that shippers first obtain contracts for the non-bottleneck segment of the origin-to-destination service, but rather that we permit shippers to seek such contracts after we prescribe a bottleneck segment rate. Petition at 7.[16] UP, supported by AAR, opposes the petition.

We will deny WRI's petition. We did not presume in our December 31st decision that rail carriers would provide

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[15](...continued)
the public docket. We agree to that request.

[16] In addition to filing comments in this proceeding, WRI has also filed a complaint seeking the prescription of bottleneck-segment unit-train coal rates over Santa Fe lines between interchanges at Kansas City and Topeka, KS, and WRI's generating stations at Lawrence and Tecumseh, KS. Western Resources, Inc. v. The Atchison, T. & S.F. Ry., No. 41604 (filed July 31, 1995). Santa Fe has moved to dismiss the complaint on grounds similar to those of the other bottleneck carriers in the other bottleneck complaints. By decision served May 31, 1996, we stayed consideration of WRI's complaint pending state court resolution of certain contract interpretation matters. On December 20, 1996, the Kansas state district court issued a ruling on this matter, WRI Aff. Reid, Exh. H, and WRI's complaint and Santa Fe's motion to dismiss are now under active consideration by the Board. Like other shipper interests, WRI argues that it will be able to secure competitive service contracts from the non-bottleneck carriers only after obtaining a regulatorily prescribed maximum reasonable rate for the Santa Fe bottleneck segment.

shippers with non-bottleneck segment contracts in response to every request. Indeed, we could not have done so because, under section 10709, contracting between rail carriers and shippers is permissive. Because we cannot direct contracting, railroads' decisions to enter into contracts must necessarily be driven by market forces and other considerations, not regulation. As UP explained, choosing whether or not to contract "turns on the circumstances of each particular situation;" in certain instances the carrier may prefer to cooperate with its connecting road on a joint-rate basis, while in other instances it may choose to compete by offering a segment contract. UP Opposition at 2-3; V.S. Gough at 2.[17] That choice is within a rail carrier's discretion, and simply establishing that a carrier has declined to enter into a non-bottleneck segment contract in one particular situation does not warrant reconsidering our December 31st decision.[18]

---

[17] Just as NS, for example, indicated that it stood ready to negotiate a contract with PP&L for the non-bottleneck segment of the utility's through transportation, Bottleneck at 11, citing Transcript of Oral Argument, October 31, 1996 at 208-09 (Transcript), UP also asserts that it does not have a policy against segment contracts and has entered into such contracts "whenever it has found it in its business interest to do so." UP Opposition at 2; V.S. Gough at 2-3. With only unsupported or unpersuasive assertions that a more concentrated and anticompetitive rail industry would decline to enter non-bottleneck segment contracts, Bottleneck at 10, Transcript at 29-30, 245-46, there was nothing to convince us that other rail carriers would not act similarly.

[18] Thus, the fact that WRI was able in 1994 to secure a separate contract for the non-bottleneck segment of its coal transportation from certain origins does not mean that UP must agree to a non-bottleneck segment contract today for additional traffic from other origins. Petition at 5-6; WRI Aff. Reid ¶ 5. We should also note that it does not appear, contrary to WRI's representations, that UP has in fact refused WRI's request for a non-bottleneck segment contract for its new coal traffic. Until the recent state court decision, it was in dispute whether, under the terms of its existing contract with Santa Fe, WRI could in fact obtain (and

(continued...)

In any event, our determination in the December 31st decision to dismiss the utilities' requested bottleneck-segment rate relief in the three complaints before us and provide guidance for subsequent cases did not, contrary to WRI's suggestions, rest on an assumption that railroads would provide non-bottleneck segment contracts in all circumstances. While we encourage non-bottleneck carriers to take advantage of opportunities to compete and provide contracts, even if such action might result in a separately challengeable bottleneck-segment rate, shippers cannot, as a matter of law, force that result beforehand by having us prescribe a local bottleneck-segment rate for what is clearly a through service. That result, as we have explained at length in our prior decision, and have restated here, would run afoul of a bottleneck carrier's statutorily protected rate and service initiatives.

It is ordered:

1. The petition for clarification is granted to the extent set forth above, and is otherwise denied.

2. The petition for reconsideration is denied.

3. This decision will be effective on May 30, 1997.

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[18](...continued)
tender to UP) coal from origins other than those listed in the contract, and in its late 1996 correspondence UP was clearly awaiting the court's decision before finalizing any service it would offer from the new origins. WRI Aff. Reid, Exhs. E, G. More significantly, UP's January 16, 1997 letter upon which WRI relies discloses only that UP asked WRI to explain why it would be advantageous for UP to separately contract, not that it was declining to do so. WRI Aff. Reid, Exh. J. at 1; see also UP Reply at 2, V.S. Gough at 1-2.

By the Board, Chairman Morgan and Vice Chairman Owen. Chairman Morgan commented with a separate expression.

Vernon A. Williams

Secretary

CHAIRMAN MORGAN, commenting:

The overriding goal of any rail economic regulatory scheme should be to ensure good service at reasonable prices. The Staggers Rail Act of 1980 sought to achieve this goal by promoting the railroad industry's financial health and encouraging competition within the industry, and throughout the transportation sector, through the removal of regulatory constraints that had stymied the operation of positive market forces. To further these objectives, Congress included in that law a variety of provisions, reaffirmed recently in the ICC Termination Act of 1995, to guide the ICC (and now the Board) in reviewing railroad rate and service matters. The Board has attempted in its first bottleneck decision, and in the decision rendered today, to apply those provisions in a way that appropriately balances these objectives.

In the rate proceedings at issue here, each of the interests has argued about these objectives, and, more specifically, that only its position would advance what it claims to be the overriding policy that should guide all of our actions. The shippers have asserted that "open access," or, more specifically, unconditioned shipper authority to direct rates and routes, is needed to promote the procompetitive goals of the statute. The railroads have claimed that any

limitations on the rate and route initiatives of bottleneck carriers would seriously erode the financial health of the industry in contravention of the statute. Rather than choosing between these two diametrically opposed positions — a result which the statute did not envision — our decisions in these bottleneck cases have concluded that Congress intended that these goals be implemented in a balanced and complementary way. Thus, our decisions have given effect to the statutory rate and routing initiatives of railroads, while at the same time promoting the interests of the shippers in efficient, innovative and competitive service.

Some of the shippers have expressed their concern that the Board has not afforded them meaningful relief. I disagree. The Board has given the shippers the opportunity to obtain significant relief, within the limits of the statute, while keeping in mind the interest of balancing the objectives of the law. The Board has not provided for "open access," but existing law does not permit that sort of a remedy. The law directs the Board to promote competition, but not to governmentally force it simply upon demand, and these decisions do just that.

Thus, while access is not automatic where a bottleneck carrier already provides origin-destination service, the Board will afford competitive access relief where efficient, innovative and competitive service is being precluded. In describing the competitive access remedy, the Board in its first bottleneck decision recognized the balance struck in the law by Congress as follows:

> "The competitive access rules [are] designed to protect the railroads' freedom to rationalize their systems and maximize service over their most efficient routes, legitimate goals that both

> Congress and this Board clearly endorse. However, they [are] not designed to defeat legitimate competitive efforts by other rail carriers and shippers by permitting bottleneck carriers to foreclose more innovative, advantageous, and efficient service."

The Board cannot indicate more clearly that we view the competitive access remedy as a real one that we will take seriously when a case is brought to us.

Likewise, I disagree with those representatives in the railroad industry that, in response to MidAmerican's petition for clarification at issue in this decision, have characterized our bottleneck decision as changing little. To the contrary, in reaffirming that bottleneck carriers cannot refuse a shipper's request for service from an origin not now served, and, as clarified today, providing the availability of bottleneck-segment rate relief should it obtain a separate contract for service over the non-bottleneck segment of this "new-origin" traffic, the Board has taken the opportunity presented by the cases before us to clarify and strengthen the legal conclusion that the railroads' rate and route initiative is not absolute and must be balanced against the statutory objective of promoting competition. Businesses are resourceful, and they will compete if given the opportunity to do so. Our decisions are significant because they encourage railroads to compete for bottleneck traffic in response to the needs of the shippers.

I recognize that the relief that these decisions provide is not self-executing. As noted, competitive access cases must be brought where a carrier already provides origin-to-destination service, and, as indicated in today's decision, the Board may need to resolve interchange disputes brought to it in "new source" cases where carriers cannot agree on an

interchange point. Moreover, shippers, to secure separate bottleneck-segment rate review, will have to enter into contracts with non-bottleneck railroads. However, if history is any guide, and if shippers are diligent in negotiating, railroads will seek out contracts to capture new business. Initiative can produce positive results.

These proceedings raise difficult issues of first impression. I believe that the Board has addressed them in a fair and evenhanded manner. If shippers and competing railroads pursue the competitive avenues afforded them in these decisions, they will find that our decisions have provided real opportunities.

APPENDIX D

IN THE

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 97-1081+

MIDAMERICAN ENERGY COMPANY, PETITIONER,

V.

SURFACE TRANSPORTATION BOARD; ET AL.

RESPONDENTS,

ORDER DENYING PETITION FOR REHEARING
AND FOR REHEARING EN BANC

The petition for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

April 20, 1999

Order Entered at the Direction of the Court:

/s/ Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX E

TEXT OF RELEVANT STATUTES

Former 49 U.S.C. § 10701a

Standards for rates for rail carriers

(a) Except as provided in subsection (b) or (c) of this section and unless a rate is prohibited by a provision of this title, a rail carrier providing transportation subject to the jurisdiction of the Interstate Commerce Commission under subchapter I of chapter 105 of this title may establish any rate for transportation or other service provided by the carrier.

(b) (1) If the Commission determines, under section 10709 of this title, that a rail carrier has market dominance over the transportation to which a particular rate applies, the rate established by such carrier for such transportation must be reasonable.

(2) In any proceeding to determine the reasonableness of a rate described in paragraph (1) of this subsection---

> (A) the shipper challenging such rate shall have the burden of proving that such rate is not reasonable if--
>
> > (i) such rate (I) is authorized under section 10707a of this title, and (II) results in a revenue-variable cost percentage for the transportation to which the rate applies that is less than the lesser of the percentages described in clauses (i) and (ii) of section 10707a(e)(2)(A) of this title; or
> >
> > (ii) such rate does not meet the description set forth in clause (i) of this subparagraph, but the

Commission does not begin an investigation proceeding under section 10707 of this title to determine whether such rate is reasonable; and

(B) the rail carrier establishing the challenged rate shall have the burden of proving that such rate is reasonable if---

(i) such rate (I) is greater than that authorized under section 10707a of this title, or (II) results in a revenue-variable cost percentage for the transportation to which the rate applies that is equal to or greater than the lesser of the percentages described in clauses (i) and (ii) of section 10707a(e)(2)(A) of this title; and

(ii) the Commission begins an investigation proceeding under section 10707 of this title to determine whether such rate is reasonable.

(3) In determining whether a rate established by a rail carrier is reasonable for purposes of this section, the Commission shall recognize the policy of this subtitle that rail carriers shall earn adequate revenues, as established by the Commission under section 10704(a)(2) of this title.

(c) (1) A rate for transportation or other service provided by a rail carrier subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title may not be established below a reasonable minimum. Any rate for transportation by such a rail carrier that does not contribute to the going concern value of such carrier is presumed to be not reasonable. A rate that contributes to the going concern value of such carrier is conclusively presumed not to be below a reasonable minimum.

(2) A rate for transportation by a rail carrier that equals or exceeds the variable cost of providing the transportation is conclusively presumed to contribute to the going concern value of such rail carrier.

(3) (A) Upon the filing of a complaint alleging that a rate is in violation of this subsection, the Commission shall take final action thereon by the 90th day after the date such complaint is filed.

(B) If the Commission determines, based on the record after opportunity for a hearing, that a rate is in violation of this subsection, the Commission shall order such rate to be raised, but only to the minimum level required by this subsection. The complainant shall have the burden of proving that such rate is in violation of this subsection.

(4)(A) For purposes of this subsection, variable costs shall be determined under formulas or procedures prescribed or certified by the Commission.

(B) In the determination of variable costs for purposes of minimum rate regulation, the Commission shall, on application of the rail carrier proposing the rate, determine only the costs of such carrier and only those costs of the specific service in question unless the specific information is not available. The Commission may not include in such variable costs an expense that does not vary directly with the level of transportation provided under the proposed rate.

Former 49 U.S.C. § 10704

Authority and criteria: rates, classifications, rules, and practices prescribed by Interstate Commerce Commission

(a)(1) When the Interstate Commerce Commission, after a full hearing, decides that a rate charged or collected by a carrier for transportation subject to the jurisdiction of the Commission under subchapter I of chapter 105 of this title, or that a classification, rule, or practice of that carrier, does or will violate this subtitle, the Commission may prescribe the rate (including a maximum or minimum rate, or both), classification, rule, or practice to be followed. The Commission may order the carrier to stop the violation. When a rate, classification, rule, or practice is prescribed under this subsection, the affected carrier may not publish, charge, or collect a different rate and shall adopt the classification and observe the rule or practice prescribed by the Commission.

Former 49 U.S.C. § 11101

Providing transportation and service

(a) A common carrier providing transportation or service subject to the jurisdiction of the Interstate Commerce Commission under chapter 105 of this title shall provide the transportation or service on reasonable request. In addition, a motor common carrier shall provide safe and adequate service, equipment, and facilities. A rail carrier shall not be found to have violated this section because it fulfills its commitments under contracts approved under section 10713 of this title before responding to reasonable requests for service.

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No. 99-135

IN THE

Supreme Court of the United States

WESTERN COAL TRAFFIC LEAGUE,

Petitioner,

v.

SURFACE TRANSPORTATION BOARD, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR RESPONDENT THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred through its failure to review interpretations and applications of Court precedent which the Surface Transportation Board used to create a new exception to the common carrier obligations of railroads, which new exception, in the court's words, permits railroads to exploit captive consumers.

CORPORATE DISCLOSURE STATEMENT

The National Industrial Transportation League is a non-profit membership corporation. It does not have any parent corporations and does not issue stock to the public.

No. 99-135

IN THE
SUPREME COURT OF THE UNITED STATES

WESTERN COAL TRAFFIC LEAGUE
v.
SURFACE TRANSPORTATION BOARD, ET AL.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE IN SUPPORT OF PETITIONER

This brief is submitted under the provisions of Rule 12.6 of the Rules of this Court on behalf of The National Industrial Transportation League ("NITL" or "the League"). Like the petitioner, Western Coal Traffic League ("Western Coal"), NITL was a petitioner for judicial review in the consolidated cases that resulted in the court of appeals decision in *MidAmerican Energy Co. v. Surface Transportation Board*, 169 F.3d 1099 (8th Cir. 1999), *reh. denied* (April 20, 1999). The League supports the petition of Western Coal in this Court for a writ of certiorari to review the decision of the court of appeals.

INTEREST OF THE NATIONAL INDUSTRIAL TRANSPORTATION LEAGUE

The League is a nationwide association of shippers engaged in all types and sizes of commercial and industrial enterprises. NITL members are substantial users of rail

transportation. Founded in 1907, NITL is the oldest, largest and most broad-based shippers' organization in the nation. Its members include industrial corporations, manufacturers, retailers, shippers' associations, boards of trade, chambers of commerce, port authorities and others concerned with the purchase of freight transportation.

REASONS FOR GRANTING THE WRIT

This case involves one of the most important issues of federal law governing rail transportation since the enactment of the Staggers Rail Act of 1980.[1] As set out in detail in the petition by Western Coal, the Surface Transportation Board ("STB" or "Board") has seriously misconstrued seminal decisions of this Court interpreting the applicable provisions of the Interstate Commerce Act.[2] The decisions of this Court clearly establish the right of rail shippers to seek prescription of a reasonable rail rate for the portion of a through movement provided by a single railroad. *Great Northern Ry. Co. v. Sullivan,* 294 U.S. 458, 462-63 (1935); *Atchison, T. & S. F. Ry. Co. v. United States,* 279 U.S. 768, 776 (1929) and *Baer Bros. Mercantile Co. v. Denver & R. G. R. Co.,* 233 U.S. 479 (1914).

---

1 Pub. L. 96-448, 94 Stat. 1895 (1980).

2 As noted in pages 2-3 and note 3 of the Western Coal petition and in note 8 of the court of appeals decision (App. A-11), while these cases were pending before the Board, the ICC Termination Act, Pub. L. 104-88, 109 Stat. 803 (Dec. 29, 1995) ("ICCTA"), repealed the Interstate Commerce Act, but reenacted many of the same provisions involved here in a new Interstate Transportation Act, 49 U.S.C. §10101, *et seq.* Section 204(b)(1) of ICCTA, however, required that the cases be decided by the Board and the courts under the prior law.

As succinctly stated by Western Coal, the court of appeals "not only did not correct the [STB's] error, it failed even to address it." Petition at 16. The court of appeals then compounded its error by affirming the Board's decision on the very economic and policy grounds that the Board expressly disavowed. The court of appeals stated that "the Board determined that exploiting bottlenecks ... assists carriers in achieving revenue adequacy." App. A-18. The STB, on the other hand, stated that its decision was "mandated by the law" and not by revenue adequacy considerations. App. B-21, note 21. The League, Western Coal and the other shipper parties before the court of appeals were thus deprived of meaningful judicial review. *Motor Veh. Mfrs. Assn. v. State Farm Mutual,* 463 U.S. 29, 50 (1983) and *SEC v. Chenery Corp.,* 332 U.S. 194, 196 (1947).

The evolution of the railroad industry during the last 20 years has resulted in a highly concentrated railroad system with numerous bottleneck situations. Congressional policy explicitly favors maximizing competition and minimizing regulatory control, while preserving the right of rail shippers to obtain reasonable rates "where there is an absence of effective competition." Former 49 U.S.C. §10101a. The errors of the Board and the court of appeals leave rail shippers, in the words of the court of appeals, with no "means of preventing the carriers from exploiting bottleneck profits." App. A-22. Unless reviewed and corrected by this Court, those errors will result in an unjustified frustration of the Congressional purpose.

CONCLUSION

The petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Eighth Circuit should be granted.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1998

WESTERN COAL TRAFFIC LEAGUE,

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v.

SURFACE TRANSPORTATION BOARD AND UNITED STATES OF AMERICA, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF OF RESPONDENT ASSOCIATION OF AMERICAN RAILROADS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 17, 1999

3488

QUESTION PRESENTED

Whether the Court of Appeals was correct in upholding decisions of the U.S. Surface Transportation Board that reaffirmed longstanding legal rules applicable to rail rates and routes and rejected a theory of "bottleneck"-rates-on-demand – a newfound theory, admittedly advanced by the complainant shippers as a "creative rate reduction strategy," which was at odds with statute and precedent and would have re-regulated the railroads, undermining two decades of rail-industry financial progress under the deregulatory and marketplace thrust of the Staggers Rail Act of 1980.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Association of American Railroads ("AAR") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Eighth Circuit's opinion in this case. That opinion is reported at 169 F.3d 1099 and is reprinted in the Appendix to the Petition ("Pet. App.") at A-1 to A-23.

This is the quintessential case that does not merit review on certiorari. The U.S. Surface Transportation Board, after a thorough review of the complex law governing railroad rates and routes, reaffirmed that law, as relevant here,[1] and rejected a newfound theory of "bottleneck"-rates-on-demand which was admittedly advanced by the complainant rail shippers as a "creative rate reduction strategy." *MidAmerican Energy Co. v. STB*, Nos. 97-1081, *et al.* (8th Cir.), Joint Brief of Petitioners Western Coal Traffic League and the National Industrial Transportation League, June 16, 1997, p. 4. That theory was at odds with statute and precedent. It would have re-regulated the railroads and undermined two decades of rail-industry financial progress since the Staggers Rail Act of 1980, Pub. L. No. 96-448, 94 Stat. 1895.

There is no need for this Court to wade into the thicket of railroad rate and route law by exercising its review authority in this case. There is no split between the circuits with regard to the Board's holdings. Those holdings have not spawned extensive litigation – to the contrary, the present

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[1] The one new exception that the Board created – involving contract rates – was found by the court of appeals not to be ripe for review. Petitioner has not challenged that finding, and that aspect of the Board's decision is accordingly not before the Court.

case remains the *only* one raising these issues. This is hardly surprising, since the Board's holdings present no legal departures or novel legal questions, but simply reaffirm long-established law, much of it dating to early in the century. No one's ability to conduct their affairs with a clear understanding of the applicable law is frustrated by the lack of a new Supreme Court decision addressing these issues. The Board's decisions are well-reasoned, and arise in the highly technical area of ratemaking where the Board's specialized expertise is greatest and most deserving of deference. *See, e.g., Burlington Northern R.R. v. STB*, 114 F.3d 206, 210 (D.C. Cir. 1997). *See generally Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) (broad deference appropriate where agency decision "necessarily require[s] significant expertise and entail[s] the exercise of judgment grounded in policy concerns") (internal quotation omitted).

Nor, as Petitioner asserts, did the Eighth Circuit base its affirmance on an improper ground. The court of appeals sustained the Board's conclusions that the shippers' "bottleneck" rate rule was contrary to multiple statutory provisions and extensive decisional precedent, including Supreme Court precedent which was properly interpreted and applied by the Board and the circuit court. The court also did not err in placing weight on the potential harmful impact of the shippers' proposed "bottleneck" rule on the ability of railroads to earn adequate revenues to continue to provide efficient rail service. Under 49 U.S.C. § 10704(a)(2),[2] the

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[2] The Interstate Commerce act was recodified effective January 1, 1996. Since the recodification did not affect the substance of the provisions at issue here, we use current section numbers, though, as Petitioner notes (Petition at 3), it appears that the three specific rate cases joined by the STB in the *Bottleneck* proceeding are governed by the pre-recodification provisions. Pre-1996 section numbers are noted in the Table of Authorities.

STB must act to ensure railroad revenue adequacy. And while the Board found other legal bases fully sufficient to justify rejecting the shippers' "bottleneck" rate rule, the record contained uncontradicted proof that the rule's potential revenue impact was devastating, and two of the three Board members stressed that revenue adequacy was a central element in their decision of the case.

Accordingly, the petition for a writ of certiorari should be denied.

COUNTER-STATEMENT OF THE CASE

As Petitioner does not accurately state what was decided below or the grounds for decision, we present the following Counter-Statement of the Case. The inescapable complexity of the issues means that this statement must be of considerable length, but we have endeavored to make it as brief and clear as possible.

A. Some Terms Defined

It is helpful to define some terms at the outset.

A *through movement* is a movement of rail traffic from an origin on one railroad to a destination on a different railroad. The point at which the first railroad transfers the traffic to the second is known as an *interchange point*.

A *through rate* is the rate for a through movement. It can take two forms: a *joint rate*, which is a unitary or *single-factor* rate covering a through movement by two or more carriers that agree privately on how to divide the revenue between themselves (their *divisions*); or a *combination rate*, which is a rate composed of separate *factors* provided to the shipper separately by different railroads and used together to cover the through movement. The factors in a combination

rate are commonly either *proportional rates*, which are rates available only for use in conjunction with other rates of connecting carriers to create a through rate for a through movement, or – only if the railroads publishing them specifically indicate that they are available to move through business – *local rates*, which are rates applicable to movements between two points on a railroad's own lines. *See Through Routes & Through Rates*, 12 I.C.C. 163, 166-67 (1907); *Metropolitan Edison Co. v. Consolidated Rail Corp.*, 5 I.C.C.2d 385, 402 (1989).

Rail rates can be common-carrier rates or contract rates. A *common-carrier rate* is a published rate, generally for the movement of a specific commodity between specific points, which is not the subject of a contract between the carrier and the shipper. Until 1995, common-carrier rail rates were required to be on public file at the ICC in the form of tariffs. The tariff filing requirement was eliminated in 1995, but railroads are still required to provide common-carrier rates on request to the extent necessary to move any shipment from origin to destination. *See* 49 U.S.C. § 11101; 49 C.F.R. pt. 1300. A *contract rate*, as the name suggests, is a rate that is the subject of a contract between the carrier and the shipper. Since 1980, the Interstate Commerce Act has permitted contracting with few restrictions. 49 U.S.C. § 10709. Rail transportation contracts are enforceable like other private contracts, and are not subject to challenge as contrary to the rail regulatory provisions of the Interstate Commerce Act. 49 U.S.C. § 10709(c).

A railroad exclusively serving a point is often referred to as the *"bottleneck" railroad*, and a rate for the movement of traffic by that railroad between that point and a point where the traffic is interchanged with another railroad to complete the through movement is often referred to as a *"bottleneck" rate*. Notwithstanding its invidious overtones, this terminology connotes nothing more than that the railroad

serving the point is the only railroad serving that point, and that there is another railroad (called the *"upstream" railroad* if the bottleneck is at destination, or the *"downstream" railroad* if the bottleneck is at origin) that could move the traffic part of the way between the origin and the destination in conjunction with the "bottleneck" railroad.

B. The *Bottleneck* Proceeding

1. The Board's Request for Comments

In August 1996, the Board issued an order inviting comments on common questions of law and policy that were raised by three railroad rate cases. Docket Nos. 41242, *et al.*, *Central Power & Light Co. v. Southern Pacific Transportation Co.*, Decision served Aug. 23, 1996, at 10. Each of the three cases had been brought by an electric utility company in regard to one or more rates for the transportation of coal in unit trains from a coal mine to a coal-fired electric generating plant. In each case, the destination plant or plants were served by only one railroad. In each, the shipper sought to compel the railroad that served the plant to provide a separate rate for the transportation of the coal from a point of interchange with another railroad to the plant. The shipper asserted that it was entitled to challenge that "bottleneck" segment rate separately for maximum reasonableness, as if it were a separate origin-destination rate. The shipper also asserted that it had the right to secure a separate segment rate from an "upstream" carrier to move the coal from the origin to the interchange point with the "bottleneck" carrier, and that once these two segment rates were in place the two railroads would be obliged to carry out the transportation as a coordinated through movement.

In two of the three cases, the "bottleneck" railroad had its own long-haul route from the origin to the destination. In those cases, in seeking a segment rate from the

"bottleneck" railroad that could be used in conjunction with a routing via a different origin railroad, the shipper was seeking to force the "bottleneck" railroad to "short-haul" itself – that is, to accept a routing that gave it a much shorter length of haul than its potential long haul.[3]

In the third case, the shipper was seeking rates for potential movements of coal from mines located on two different "upstream" railroads. The shipper sought to require the "bottleneck" railroad to provide segment rates to the destinations from interchange points with the "upstream" railroads. The shipper wished to force the "upstream" railroads to compete against each other for each movement, and then to use the pertinent "bottleneck" rate in conjunction with the origin-to-interchange-point rate of the winning "upstream" railroad to move the coal to destination. In this case, the "bottleneck" railroad had no potential longer haul for any of the particular movements than the "bottleneck" segments for which the shipper was seeking to compel the publication of separate rates.

In none of the three cases did the shipper have a contract with an "upstream" railroad for the movement of the traffic from the origin to the desired interchange point with the "bottleneck" carrier.

In each of the three cases, the defendant railroads had moved to dismiss. They had argued that while the law provides that railroads must make routes and furnish rates to move any shipment from origin to destination, a railroad is not obliged to provide a shipper with separate, and separately challengeable, rates for any segment of a through movement

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[3] The situation in one of these cases was actually more complicated than this because of a settlement agreement in another case, but that refinement is not material here.

that the shipper may choose. Rather, under 49 U.S.C. § 10701(c), railroads are entitled to what is known as the "rate and route initiative" – which means that they are entitled in the first instance to specify the form that a through rate will take (*e.g.*, whether the rate shall be a joint or combination rate, and, if combination, whether the factors shall be proportional or local rates), and the point of interchange if more than one railroad is involved in the movement. So long as the shipper is provided a rate to move the traffic from the origin to the destination, the shipper cannot insist on a different form of rate or on different points of interchange, except in limited circumstances where a railroad has foreclosed the use of a route that is clearly more efficient than the one to which the existing through rate applies. 49 C.F.R. § 1144.5 (Competitive Access Rules). Also, under 49 U.S.C. § 10705(a)(2), a railroad generally cannot be forced to "short-haul" itself by participating in an interline rate with another railroad via a nearby junction in lieu of a longer haul over its own lines. And, under longstanding precedent, the maximum reasonableness of a through rate can only be challenged on a through basis: the separate factors that make up the through rate cannot be separately challenged. *E.g.*, *Louisville & Nashville R.R. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217, 234 (1925).

In its August 1996 order, the Board invited comments from all interested persons on the legal and policy issues posed by the three cases. A central issue that the Board identified for comment was the continued vitality of the longstanding rule that a through rate can be challenged only on a through basis. That rule is essential to the regime of maximum rate regulation that the ICC adopted after extended consideration in the 1980s in *Coal Rate Guidelines, Nationwide*, 1 I.C.C.2d 520 (1985), *aff'd sub nom. Consolidated Rail Corp. v. United States*, 812 F.2d 1444 (3d Cir. 1987). That regime, which flows from the deregulatory, market-based thrust of the Staggers Rail Act of 1980, allows

railroads to price "differentially," that is, to charge higher mark-ups on traffic that has fewer transport alternatives (low-elasticity traffic) and lower mark-ups on traffic that can readily shift to truck or have recourse to other alternatives (high-elasticity traffic).

The upper constraint on such mark-ups is that rail rates, on an origin-to-destination basis, cannot exceed "stand-alone cost," which is the full cost, including cost of capital, of providing the most efficient service from origin to destination in a hypothetical environment of no barriers to entry or exit. In *Coal Rate Guidelines*, the Commission found that it was critical, if the railroad industry is to have a reasonable opportunity to cover its fixed and common costs and thus be "revenue adequate," to permit railroads to price their low-elasticity traffic up to the level of stand-alone cost on an origin-to-destination basis, insofar as the market permits such pricing. This is true because so much rail traffic faces competition and must move at lower rail rates if the railroad is to compete successfully for handling it. If rates were forced to lower levels, the railroads could not earn enough to reinvest in their physical plant and remain viable. *Id.* at 526-27, 535.[4] The Commission also found that, under a regime of differential pricing constrained by the stand-alone cost test (and certain other constraints that the Commission adopted), no shipper would subsidize any other or be forced to pay an unreasonable rate. *Id.* at 523-24, 549.

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[4] *See also, e.g., Mr. Sprout, Inc. v. United States*, 8 F.3d 118, 124-25 (2d Cir. 1993), *cert. denied*, 512 U.S. 1205 (1994) ("Railroads must charge above fully allocated costs if they are to achieve revenue adequacy and stay in business."); *Potomac Electric Power Co. v. ICC*, 744 F.2d 185, 193 (D.C. Cir. 1984) ("rates necessarily must exceed fully allocated costs if the carrier is to earn adequate revenue"); Ex Parte No. 445 (Sub-No. 2), *Intramodal Rail Competition – Proportional Rates*, ICC Decision served May 2, 1990, at 4 (agency has "consistently recognized that differential pricing is essential to the viability of the industry").

A key question raised by the Board in its August 1996 order was whether the economic viability of the railroads would be threatened if "bottleneck" railroads were forced to quote separate "bottleneck" rates and those rates could be restricted to the stand-alone cost of just the "bottleneck" segment, while rates for the remainder of the haul were bid down to a level determined by head-to-head competition between two or more railroads. The Board said that such a "bottleneck" rate scheme arguably might introduce more competition, in the sense that a part of the through haul would be opened to competing bids, and this might be in keeping with the injunction in the national transportation policy that the Board "allow . . . competition and the demand for services to establish reasonable rates." 49 U.S.C. § 10101(1). On the other hand, the Board questioned whether this would be consistent with the parallel statutory injunctions that it permit railroads to the greatest feasible extent to conduct their business as they choose, free from unnecessary regulation (49 U.S.C. § 10101(2)), and that it "promote a safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues" (49 U.S.C. § 10101(3)). *See also* 49 U.S.C. §§ 10701(d)(2) (in determining rate reasonableness, Board must recognize "the policy of this part that rail carriers shall earn adequate revenues"), 10704(a)(2) (Board "shall make an adequate and continuing effort" to assist railroads in attaining adequate revenues).

2. The Comments

Comments were submitted by numerous parties. The principal comments for the railroad industry were submitted by the AAR. Comments, Oct. 15, 1996. Individual railroads also submitted comments.

The railroad parties' comments reviewed the settled law regarding rail rates and routes, and showed that it was

incompatible with any scheme of mandatory "bottleneck" rates and separate challenges to the levels of such rates.

That legal structure has the following seven essential elements:

First, railroads, as common carriers, are required to provide rates and routes to move traffic, when tendered by a shipper, from any origin to any destination.[5] If it is necessary for more than one railroad to participate in order to get the traffic from origin to destination, the railroads have a legal obligation to interchange the traffic and establish a through route and rate for it.[6]

Second, under the Board's Competitive Access Rules, railroads cannot foreclose interline routes that are more efficient than their own single-line routes by refusing to deal with interline partners or insisting on unreasonably high revenue divisions.[7] On the other hand, they are not required to enter into any interline route a shipper may choose, regardless of its inefficiency.[8]

Third, within these parameters, railroads are, as noted, entitled to the "rate and route initiative" – that is, they

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[5] 49 U.S.C. § 11101(a); *Overbrook Farmers Union Cooperative Ass'n – Violation of 49 U.S.C. § 11101(a)*, 5 I.C.C.2d 316 (1989); other cases cited at AAR Comments, p. 11 n.3.

[6] 49 U.S.C. §§ 10703, 10742; *Routing Restrictions Over Seatrain Lines, Inc.*, 296 I.C.C. 767, 773-74 (1955); other cases cited at AAR Comments, p. 11 n.4.

[7] 49 C.F.R. § 1144.5; *Intramodal Rail Competition*, 1 I.C.C.2d 822 (1985), *aff'd sub nom. Baltimore Gas & Electric Co. v. United States*, 817 F.2d 108 (D.C. Cir. 1987).

[8] *E.g.*, *Vista Chemical Co. v. Atchison, Topeka & Santa Fe Ry.*, 5 I.C.C.2d 331, 341-42 (1989).

are free to specify where they will interchange traffic for an interline movement and the form of the rate (joint, combination of proportionals, combination of locals, etc.) that they will provide to the shipper for the through movement.[9]

Fourth, a railroad's local rate can be used in conjunction with other rates of connecting railroads as a factor in a through rate only if the railroad intends for it to be available for use in that fashion.[10]

Fifth, a railroad is not required to provide a shipper with a separate, and separately challengeable, rate for a segment of a through movement.[11]

Sixth, a railroad cannot be compelled to "short-haul" itself by participating in an interline route over a nearby junction unless the route that would give it a longer haul is clearly less efficient.[12]

And *seventh*, it is only the entire rate for a through movement – regardless of the form of its components or their individual dollar magnitude – that can be challenged for maximum reasonableness. As the Supreme Court stated in the seminal case: "The shipper's only interest is that the joint rate be reasonable as a whole." *Louisville & Nashville R.R.*

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[9] 49 U.S.C. § 10701(c); *United States v. Illinois Central R.R.*, 263 U.S. 515, 522 (1924); other cases cited at AAR Comments, p. 12 n.6.

[10] *Thompson v. United States*, 343 U.S. 549 (1952); *Baltimore & Ohio Southwestern Ry. v. Settle*, 260 U.S. 166 (1922); *Marshall Manufacturing Co. v. Texas & Pacific Ry.*, 29 F.2d 660, 661 (5th Cir. 1928); *Seatrain*, 296 I.C.C. at 774-75, 783-85.

[11] *E.g.*, Ex Parte No. 445 (Sub-No. 2), *Intramodal Rail Competition – Proportional Rates*, ICC Decision served May 2, 1990.

[12] 49 U.S.C. § 10705(a)(2).

v. Sloss-Sheffield Steel & Iron Co., 269 U.S. 217, 234 (1925).[13] As already noted, this rule, commonly referred to as the "through-rate rule," is central to the ability of the railroads to price differentially (subject to the stand-alone cost cap), as endorsed in *Coal Rate Guidelines*, and the governing precedents confirm that the stand-alone cost test is to be applied to the entire through movement.[14]

The railroads further demonstrated in their comments that any scheme of mandatory "bottleneck" rates would impose a pervasive new regulatory regime on the rail industry and gravely impair its financial viability. A large portion of rail shippers are exclusively served. *E.g.*, AAR Comments, Verified Statements of David M. Levan, p. 15, & Richard K. Davidson, p. 14. Expert testimony established that forcing railroads to establish separate "bottleneck" rates for these shippers, and allowing those rates to be separately challenged and restricted to an artificially calculated stand-alone cost for the "bottleneck" segment alone, while subjecting the remainder of the haul to bids by multiple railroads, would cost the rail industry at least $2.4 billion per year and condemn it to chronic revenue inadequacy and ultimate non-viability. *Id.*, Verified Statement of Craig F. Rockey & John C. Klick ("Rockey/Klick VS"), pp. 1-16;

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[13] *See also, e.g., Great Northern Ry. v. Sullivan*, 294 U.S. 458, 463 (1935); *Metropolitan Edison*, 5 I.C.C.2d at 400-10 (thoroughly reviewing precedents, reaffirming the rule that only the through rate may be challenged as excessive, and overriding any ICC decisions to the extent they are to the contrary); other cases cited at AAR Comments, pp. 14-15 n.12. *Metropolitan Edison* rendered the Berry article cited by Petitioner (Petition at 15 n.16) obsolete.

[14] *E.g., Burlington Northern, Inc., & Burlington Northern R.R. – Control & Merger – Santa Fe Pacific Corp. & Atchison, Topeka & Santa Fe Ry.*, 10 I.C.C.2d 661, 753 (1995), *aff'd sub nom. Western Resources, Inc. v. STB*, 109 F.3d 782 (D.C. Cir. 1997); *Metropolitan Edison*, 5 I.C.C.2d at 409.

AAR Rebuttal, Oct. 25, 1996, Reply Verified Statement of Craig F. Rockey & John C. Klick ("Rockey/Klick RVS"), pp. 1-5.

The reason, quite simply, is that where railroads compete head-to-head for traffic all the way from the origin to the destination, rates are only, on average, 106% of variable cost, whereas the industry needs to earn, on average, 150% of its variable cost to cover its high fixed and common costs and remain viable. Rockey/Klick VS, p. 8; Rockey/ Klick RVS, p. 4. It is only through the differential pricing of lower-elasticity traffic on an origin-destination basis that the industry has been able to move toward revenue adequacy. Any scheme of mandatory, separately challengeable "bottleneck" rates would tend to drive nearly all rates down to the revenue-inadequate 106% level, deprive the railroad industry of the capital needed for the continued provision of efficient rail services, and ultimately harm all shippers. AAR Comments, Verified Statement of Robert W. Anestis, pp. 1-27; AAR Rebuttal, Reply Verified Statements of William J. Baumol & Robert D. Willig ("Baumol/Willig RVS"), pp. 1-24, & Robert W. Anestis, pp. 1-8.

This was confirmed by a panel of noted economists (AAR Motion for Leave to File, Oct. 21, 1996, Statement of Economists), and by a panel of the investment bankers who supply capital to the industry (AAR Comments, Verified Statement of Investment Bankers & Securities Analyst). It was further underscored by the testimony of numerous shippers, ports and rail labor unions that feared the consequences for the continued provision and improvement of rail services of such a change in the existing regime of railroad rate regulation. AAR Comments, Tabs 12 through 45; AAR Motion for Leave to File, Verified Statement of Steven R. Dillenbeck. The railroads' expert testimony specifically established that allowing railroads to earn only the stand-alone cost of "bottleneck" segments would not

allow the rail *network* to be self-sustaining. AAR Comments, Verified Statement of William J. Baumol & Robert D. Willig ("Baumol/Willig VS"), pp. 14-22; Baumol/Willig RVS, pp. 4-6. Indeed, the very concept of a separate stand-alone cost for a "bottleneck" segment is meaningless, because no rational investor would construct a "bottleneck" segment in a regulatory regime that precluded the *rest* of the rail network, over which "bottleneck" shipments must move to get from origin to destination, from covering its costs. Baumol/Willig VS, pp. 14-16.

The complainant shippers and their supporters, in their comments, did not offer any studies to dispute the railroads' evidence as to the devastating economic effect on the rail industry of a "bottleneck" rate scheme. Rather, they rested their position principally on two arguments.

First, they asserted that, as a matter of law, shippers were entitled to move their traffic from origin to destination in a series of separate, segment-by-segment "journeys," and to secure separate and separately challengeable local rates from different railroads for each such segment. They claimed that they were not seeking a through rate at all, but only multiple, seriatim rates for unrelated journeys that happened to be end-to-end. *E.g.*, WCTL Comments, Oct. 15, 1996, pp. 12-19. In reply, the railroads showed that well-established law distinguishes between through movements and genuinely separate local journeys on the basis of whether the shipper's actual intent upon dispatching the traffic is to move it all the way from the origin to the destination.[15] The railroads pointed out that if the complainant shippers' theory that every through movement could be disaggregated into

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[15] *See Atlantic Coast Line R.R. v. Standard Oil Co.*, 275 U.S. 257, 267-73 (1927); other cases cited at AAR Comments, p. 31 n.30.

separate journeys were correct, this would effectively repeal most aspects of the law governing railroad routes and rates, including the statutory carrier rate and route initiative, the statutory short-haul provision, the well-established doctrine that a through rate can only be challenged on a through basis and cannot be challenged in segments, and the Board's Competitive Access Rules and the precedents thereunder, which limit shippers' ability to override carrier routing choices to situations involving the clear foreclosure of efficient routes. AAR Comments, pp. 30-32; AAR Rebuttal, pp. 18-21. Though the shippers argued that their "multiple journeys" theory had long been the law, they could not explain why no shipper had brought an action seeking a segment rate on the basis of such a theory in living memory, or why, for example, shippers had expended great time and resources on hard-to-prove cases under the Competitive Access Rules[16] when those cases would have been resolved instantaneously in the shippers' favor if the "multiple journeys" theory were correct.

Second, the complainant shippers argued that a regime of mandatory "bottleneck" rates would further "deregulate" the railroads and promote competition. *E.g.*, MidAmerican Comments, Oct. 15, 1996, pp. 10-13. The railroads replied that a "bottleneck" rate scheme would actually be *re*-regulatory, not *de*regulatory. The structure of the existing rail network has evolved through transportation and capital market decisions, with some transportation

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[16] *See Midtec Paper Corp. v. Chicago & North Western Transportation Corp.*, 3 I.C.C.2d 171 (1986), *aff'd sub nom. Midtec Paper Corp. v. United States*, 857 F.2d 1487 (D.C. Cir. 1988); *Vista Chemical Co. v. Atchison, Topeka & Santa Fe Ry.*, 5 I.C.C.2d 331 (1988); *Shenango, Inc. v. Pittsburgh, Chartiers & Youghiogheny Ry.*, 5 I.C.C.2d 995 (1989), *aff'd mem. sub nom. Shenango, Inc. v. ICC*, 955 F.2d 722 (D.C. Cir. 1992).

markets eliciting the construction of multiple competing railroads, and others, with less available traffic, eliciting the construction of only a single railroad. Artificially forcing head-to-head railroad competition into the latter markets through mandatory rate rules would represent the imposition of new regulation, not deregulation. And by ensuring that railroads became non-viable, the "bottleneck" rate scheme would actually destroy, not promote, competition. Competition, to be meaningful, must be sustainable, and the "bottleneck" rate proposal, by forcing exclusively-served rail traffic to be subjected to head-to-head bidding by multiple railroads, would prevent the railroads from covering their costs, and thus undermine genuine, sustainable competition. AAR Rebuttal, pp. 4-7.

3. The *Bottleneck I* Decision

In its Decision served on December 31, 1996 ("*Bottleneck I*") (Pet. App. at B-1 to B-37), the Board agreed with the railroads on most of the issues. It rejected the complainant shippers' "multiple journeys" theory, confirmed that local rates are not available for through traffic unless a railroad specifically so provides, and held that shippers are not entitled to "bottleneck" segment rates on demand. The Board reaffirmed the carrier's right to the rate and route initiative and the continuing validity of the statutory short-haul provision, while also underscoring that it would aggressively enforce the Competitive Access Rules to provide a remedy if railroads insisted on inefficient routes. The Board agreed that the complainant shippers' "bottleneck" rate proposal, and other similar proposals, were *re*-regulatory, not *de*regulatory, and that, subject to the constraints imposed by maximum rate regulation, railroads are entitled to price differentially from origin to destination. *Bottleneck I* at 5-11, Pet. App. at B-9 to B-20.

The Board also reaffirmed that through rates must be challenged on a through basis. *Id.* at 11-13, Pet. App. at B-20 to B-23. However, the Board created a new exception to this longstanding rule. The Board held that if one factor in a through rate is a *contract* rate, and the other factor is a common-carrier rate, the Board would consider the maximum reasonableness of the common-carrier factor separately, as if it were an independent origin-to-destination rate. *Id.* at 13-14, Pet. App. at B-23 to B-25. The Board rested this holding on 49 U.S.C. § 10709(c)(1), which provides: "A contract that is authorized by this section, and transportation under such contract, shall not be subject to this part, and may not be subsequently challenged before the Board or in any court on the grounds that such contract violates a provision of this part." Since, the Board said, this provision deprived it of "rate reasonableness jurisdiction" over rail transportation contracts, it was precluded from considering the level of an entire through rate where one factor in such a rate was a contract rate. *Bottleneck I* at 13, Pet. App. at B-24.

The Board dismissed all three of the pending cases insofar as they sought the prescription of "bottleneck" rates. *Id.* at 14-18, Pet. App. at B-26 to B-31. The Board's holding regarding contracts was of no consequence in any of the three cases, because, as noted, none of them involved a contract rate factor.

4. The *Bottleneck II* Decision

One of the complainant shippers, MidAmerican Energy, then filed a petition for clarification, asking the Board to elaborate on its contract ruling. Even though MidAmerican's case did not involve a contract rate factor, nor did either of the other cases before the Board, MidAmerican asked the Board to answer a number of questions regarding the obligations of railroads to provide

rates under various scenarios involving contract rate factors, and how rate challenges would be entertained in those circumstances. MidAmerican Petition for Clarification, Jan. 21, 1997.

In its Decision served on April 30, 1997 ("*Bottleneck II*") (Pet. App. at C-1 to C-24), the Board responded to MidAmerican's queries, and expanded on the contract holding in *Bottleneck I* in a critical respect. In *Bottleneck I*, the Board had said that *if* a through rate was composed of a contract rate factor and a common-carrier rate factor, the reasonableness of the common-carrier rate factor would be evaluated separately. In *Bottleneck II*, the Board now went on to address a "bottleneck" carrier's obligation to *cooperate* in creating such a situation, notwithstanding its right to the rate and route initiative under 49 U.S.C. § 10701(c).

The Board said that if a "bottleneck" carrier that did not serve both ends of a movement was presented with a contract between the shipper and an "upstream" railroad for transportation of the traffic between that end of the movement and an interchange point – and assuming that, where alternative interchange points between the two railroads were available, any dispute as to the location of the interchange was resolved by agreement or a decision of the Board – the "bottleneck" carrier would be *compelled* to provide a common-carrier rate factor for the "bottleneck" segment for use in conjunction with the contract rate factor to create a through rate. *Bottleneck II* at 9-10, Pet. App. at C-15 to C-16. The Board rejected AAR's argument that in at least some cases the appropriate remedy should be for the Board to prescribe a joint rate for the entire through movement and establish a reasonable division of the through revenue between the carriers pursuant to 49 U.S.C. § 10705(a). *Bottleneck II* at 11, Pet. App. at C-17. The Board said it foresaw "little likelihood" of granting the prescription/division remedy suggested as an alternative by AAR –

and its ultimate holding rejecting that remedy was unequivocal. *Id.*

In concurring statements to the *Bottleneck* decisions, two of the three Board members stressed that, in deciding the cases as they had, they had taken particular care to balance the Interstate Commerce Act's desideratum of revenue adequacy against pro-competition policies reflected in the statute. *Bottleneck I* at 19, Pet. App. at B-35 (Owen, Commissioner); *Bottleneck II* at 14, Pet. App. at C-21 to C-22 (Morgan, Chairman).

5. The Eighth Circuit Appeals

Both the shippers and the railroads appealed the two *Bottleneck* decisions. The Eighth Circuit affirmed, as against the shipper appeals, the STB's rejection of a general right to "bottleneck" segment rates on demand, expressly relying on the Board's reasoning and expertise in all respects. The court found the railroads' cross-appeals on the contract holdings of the two decisions not to be ripe, and dismissed them, leaving those issues to be raised in a case in which the contract holdings were actually relied upon to grant relief against a railroad. Such a case is pending in the D.C. Circuit. *Union Pacific R.R. v. STB*, No. 98-1058 (D.C. Cir., *appeal docketed*, Feb. 9, 1998).

REASONS FOR DENYING THE WRIT

The reasons for denying a writ of certiorari in this case are manifold.

A. No Circuit Split

There is no conflict among the circuits with regard to the *Bottleneck* holdings tendered for review here. Indeed, no

other case has arisen in more than two years that presents those issues.[17]

B. No New Law

That the holdings under challenge have spawned no litigation in over two years, save the present review proceeding, is hardly surprising, for those holdings made no new law, but rather simply reaffirmed longstanding statutory and case law.

The Eighth Circuit held: "Nothing in the Act explicitly requires carriers to provide separate local rates for bottleneck service." 169 F.3d at 1109, Pet. App. at A-23. Such a regime of "bottleneck"-rates-on-demand would be incompatible with the core statutory provisions pertaining to rail rates and routes, including the rate-and-route-initiative provision (49 U.S.C. § 10701(c)) – which in turn reflects the critical statutory goal of "allowing railroads to achieve revenue adequacy by competing on a free-market basis" – and the short-haul provision (49 U.S.C. § 10705(a)(2)). 169 F.3d at 1104-05, 1106, Pet. App. at A-12 to A-13, A-16 to A-17. It would also effectively render moot the Board's Competitive Access Rules, under which the Board will mandate new through routes only where there is anticompetitive conduct, and not simply on demand. *Id.* at 1108-09, Pet. App. at A-22.

It was the *shipper complainants*, with their "multiple journeys" theory, that would have created new – and untenable – law, by effectively repealing these statutory and regulatory provisions, reading a "bottleneck"-rates-on-

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[17] The *Union Pacific* case just cited presents issues *not* presented here, because the Eighth Circuit found them not to be ripe, a finding that Petitioner does not challenge.

demand provision into the statute that is not to be found in it, and redefining the common carrier obligation in a manner at odds with the "significant limitations" that the statute imposes on shippers' rights to dictate the routes and rates they are provided to move their traffic from origin to destination. *Id.* at 1106, Pet. App. at A-16. The shippers' claim of a right to separately-challengeable "bottleneck"-rates-on-demand would also have effectively overruled decades of case law, including binding Supreme Court precedent, that provides that through rates may only be challenged on a through basis because the overall level of the through rate is the only matter in which the shipper has a legitimate interest (the "through-rate rule"). *E.g.*, *Great Northern Ry. v. Sullivan*, 294 U.S. 458 (1935), cited at 169 F.2d at 1106, Pet. App. at A-16.

C. The Eighth Circuit Did Not Improperly Stress Revenue Adequacy

In every one of its holdings just described, the Eighth Circuit was sustaining points on which the Board had relied. Thus, the Board, like the court, noted the absence of any "bottleneck" rate requirement in the Interstate Commerce Act (*Bottleneck I* at 8, Pet. App. at B-13); noted the incompatibility of such a requirement with the rate-and-route-initiative provision (49 U.S.C. § 10701(c))[18] and the short-haul provision (49 U.S.C. § 10705(a)(2)) of the statute (*Bottleneck I* at 8, Pet. App. at B-13 to B-14; *Bottleneck II* at 3-5, Pet. App. at C-4 to C-8); noted the incompatibility of such a requirement with its Competitive Access Rules

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[18] Which, contrary to Petitioner (Petition at i, 13), is *not* a "new exception," but has been the law for many decades. *See, e.g.*, *United States v. Illinois Central R.R.*, 263 U.S. 515, 522 (1924); *ICC v. Louisville & Nashville Ry.*, 227 U.S. 88, 92 (1913).

(*Bottleneck I* at 6-11, Pet. App. at B-11 to B-20); held that the shipper position misinterpreted the common carrier obligation (*Bottleneck I* at 4-5, Pet. App. at B-8 to B-9); and found that a regime of "bottleneck"-rates-on-demand could not be squared with the through-rate rule, which is grounded in binding Supreme Court precedent (*Bottleneck I* at 11-13, Pet. App. at B-20 to B-23; *Bottleneck II* at 4, Pet. App. at C-6).

Despite these many respects in which the Eighth Circuit closely tracked, in its grounds for affirmance, the reasoning of the Board, Petitioner argues that the court placed too much reliance on the need to ensure revenue adequacy, a rationale supposedly disclaimed by the Board. But the Board did not disclaim such a rationale; it only declined to rule on the accuracy of the railroads' projections as to the revenue loss that the shippers' "bottleneck" rate proposal would cause, and opined that it did not "expect *our decision here*" – which, of course, *rejected* the shippers' proposal – "to produce the type of revenue disruptions projected by the railroads." *Bottleneck I* at 12 n.21, Pet. App. at B-21 n.21 (emphasis added).[19] The Board did not deny that revenue adequacy would be cast in question by a regime of "bottleneck" rates – indeed, that was a central consideration that the Board had adverted to in joining the three shipper rate complaints and framing the *Bottleneck* proceeding[20] – and two of the three Board members stressed

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[19] The Board was in error in suggesting that there were competing revenue impact studies in the record. In fact, the railroads presented the *only* such study, which should have been adopted as uncontested.

[20] *See* Docket Nos. 41242, *et al.*, *Central Power & Light Co. v. Southern Pacific Transportation Co.*, Decision served Aug. 27, 1996, p. 9; *see also Bottleneck I* at 3, Pet. App. B-5 to B-6 (railroads' concern that "segmented rate reasonableness determinations on trough movements would . . . directly threaten the industry's ability to price differentially and recover its full costs, and thereby defeat Congress' directive to 'promote a (...continued)

that in deciding the case, they balanced revenue adequacy considerations against the pro-competitive goals of the statute. *See Bottleneck I* at 19 [illegible]t. App. at B-35 (Owen, Commissioner); *Bottleneck II* at [illegible], Pet. App. at C-21 to C-22 (Morgan, Chairman).[21] Thus, while the Eighth Circuit was inaccurate in describing the Board as explicitly balancing revenue adequacy against other considerations in the body of the Board opinion proper, it was clearly correct in viewing revenue adequacy as an important factor in the Board's decisions. The Eighth Circuit's opinion is certainly not worthy of Supreme Court review simply because of this relative nuance with regard to the multiple and overlapping grounds for affirmance.

D. The Board Did Not Misconstrue Supreme Court Precedent

Petitioner finally argues (Pet. at 9) that "constructions and applications of [this] Court's authorities . . . lie at the heart of this case," and that the Eighth Circuit erred in failing to correct erroneous STB "constructions and applications" of several Supreme Court decisions. Petitioner is wrong on both counts.

First, most of the numerous bases for the Board's – and the Eighth Circuit's – rejection of a regime of separately-challengeable "bottleneck"-rates-on-demand rested on statutory provisions (the route-and-rate initiative and short-haul provisions), regulatory provisions (the Competitive Access Rules), or decisional precedents of the Board and its

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safe and efficient rail transportation system by allowing rail carriers to earn adequate revenues'") (quoting 49 U.S.C. § 10101(3)).

[21] The point was also stressed in the STB's brief in the Eighth Circuit (at pp. 1-2, 24-26).

predecessor the ICC (the grounding of the through-rate rule in *Metropolitan Edison Co. v. Consolidated Rail Corp.*, 5 I.C.C.2d 385, 401-10 (1989), which exhaustively reviewed the precedents in this area and overruled any precedents contrary to its holding that the rule applied regardless of the form of the rate in question; and the grounding of the Board's rejection of the shippers' "multiple journeys" theory in *Routing Restrictions Over Seatrain Lines, Inc.*, 296 I.C.C. 767 (1955)). *Only* a *part* of the grounding of two of those decisional bases was provided by Supreme Court decisions: (1) part of the grounding for the through-rate rule rested on Supreme Court precedent, particularly the *Great Northern* case; and (2) part of the grounding for rejection of the shippers' "multiple journeys" rule rested on Supreme Court precedents such as *Baltimore & Ohio Southwestern Ry. v. Settle*, 260 U.S. 166 (1922), and *Thompson* v. *United States*, 343 U.S. 549 (1952). Thus, as these Supreme Court opinions, important as they are, provided only cumulative support for the pertinent bases of decision, the Eighth Circuit was not obligated to review extensively in its opinion all the details of the debate as to their correct interpretation.

Second, and more fundamentally, the STB did not err in interpreting these Supreme Court decisions.

- Rejecting the same shipper arguments that Petitioner advances here, the Board very clearly explained in *Bottleneck I* at 12-13, Pet. App. B-21 to B-22, why *Great Northern* was not inapplicable to proportional rates and could not be restricted to rate prescription as distinguished from reparations, and why *Atchison,*

Topeka & Santa Fe Ry. v. United States, 279 U.S. 768 (1929), was not to the contrary.[22]

- The Board also rejected the shippers' effort to consign cases like *Settle* and *Thompson* to irrelevance by the vague – and circular – argument that those cases dealt with when a through movement was involved, whereas the shippers supposedly were seeking separate (but coordinated) "local" movements. The whole point of the *Settle/Thompson* line of cases is that a shipper cannot do what these shippers were attempting to do through this argument: dictate whether traffic is shipped in a through movement simply by the labels they unilaterally apply. Rather, if, as was plainly the case here, the shipper's intent when dispatching the traffic is to effect the through transportation of the traffic to destination, the movement is a through movement whether or not the shipper calls it two separate local movements.[23] The Board confirmed this by proceeding directly to, and amply supporting, the dispositive point: that a shipper has no right to insist that what is actually a through movement be handled under separate local rates. *See Bottleneck I* at 4-6, Pet. App. at B-6 to B-10.

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[22] The *Santa Fe* case also, of course, pre-dated *Great Northern*, and did not focus specifically on the through-rate rule, as did *Great Northern*.

[23] The fact that an occasional through movement may occur without a through route and rate being in place (Petition at 14) does not change this. *Denver & Rio Grande Western R.R. v. Union Pacific R.R.*, 351 U.S. 321, 329 (1965).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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IN THE

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WESTERN COAL TRAFFIC LEAGUE, *Petitioner,*

v.

SURFACE TRANSPORTATION BOARD
and UNITED STATES OF AMERICA, ET AL., *Respondents.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Petitioner Western Coal Traffic League ("Western Coal") hereby files this Reply to the September 17, 1999 Brief of Respondent Association of American Railroads ("Railroads") in Opposition to Petition for Writ of Certiorari ("Railroads' Brief").

SIGNIFICANT CONCESSIONS MADE BY THE RAILROADS PROVIDE ADDITIONAL SUPPORT FOR WESTERN COAL'S POSITION

In their Brief, the Railroads offer certain new admissions and concessions which further demonstrate the validity of Western Coal's arguments in support of a writ of certiorari.

1. The Eighth Circuit's Holding is Inaccurate

Although the Railroads' Brief misleadingly implies otherwise at certain points (*id.* at 20 & 21), the sole basis which the Eighth Circuit articulated for its decision affirming the Surface Transportation Board ("Surface Board") is its holding that the Surface Board "... properly reconciled the competing policies of the Act." *See* Petition at 8-10; Pet. App. A-23. As to this holding, the Railroads concede that the Eighth Circuit was "inaccurate." *See* Railroads' Brief at 23.

2. Not All Through Movements Implicate Through Rate Law

Western Coal argues that the Surface Board erred by wrongfully applying Court precedent on the law of through rates* to the proposed movements of the electric companies which would not move pursuant to through rates or through routes. *See* Petition at 13-14. While the Railroads seek to justify the Surface Board's mis-reliance on the Court's through rate cases (Railroads' Brief at 3), in the end they are forced to concede that there is, indeed, a category of through railroad movements which do not move pursuant to the joint rate and route laws. Id. at 25 n.23. These are the electric company movements. In rejecting the rate challenges of the electric companies on the basis of through rate law, the Surface Board applied the wrong standards of law to their movements.

3. The Applicable Law

The Board reached an erroneous decision because of its reliance on inapplicable Court precedent. It compounded its mistake by its failure to follow the Court's authorities

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* *See, e.g., Thompson v. United States*, 343 U.S. 549 (1952), *Louisville & N. R.R. v. Sloss-Sheffield & Iron Co.*, 269 U.S. 217 (1925), *Baltimore & O.S.W. R.R. v. Settle*, 260 U.S. 166 (1922).

which were directly applicable; namely *Atchison, T. & S.F. Ry. v. United States*, 279 U.S. 768 (1929) and *Great Northern Co. Ry. v. Sullivan*, 294 U.S. 458 (1935). The best that the Railroads can muster in the Surface Board's defense is their assertion that the Court's rate challenge principles which the electric companies champion were "overruled" -- in an agency decision. *See* Railroad Brief at 12 & 24 (*citing Metropolitan Edison Co. v. Consolidated Rail Corp.*, 5 I.C.C.2d 385 (1989)).

CONCLUSION

The decisions below enable the economic exploitation of electric consumers by the misapplication of Court precedents intended to protect the public from abuse by railroad monopolies. Only the Court can correct the misuse of its authorities.

Respectfully submitted,

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